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THE

TRIAL

OF

Col. Aaron Burr,

ON AN INDICTMENT FOR

TREASON,

Before the CIRCUIT COURT of the UNITED STATES, held in Richmond, (Virginia), May term, 1807.

INCLUDING THE

ARGUMENTS AND DECISIONS

On all the Motions made during the Examination and Trial, and on the Motion for an Attachment against Gen. Wilkinson.

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Circuit Court of the United States.

MONDAY, *August* 3, 1807.

Preſent, JOHN MARSHAL, Chief Juſtice of the United States.

The trial of Col. AARON BURR this day commenced, pursuant to adjournment, on an indictment for treaſon againſt the United States.

The Court aſſembled at 12 o'clock, and an immenſe concourſe of citizens attended to witneſs the proceedings.

A few minutes after Col. Burr entered, attended by his Counſel and Mr. Alſton, from South Carolina.

Mr. HAY obſerved, that he could take no ſteps in the buſineſs until he had aſcertained whether the witneſſes ſummoned on the part of the United States were preſent. He therefore requeſted that their names might be called over, which was accordingly done; when it appeared that of 102 on the liſt, only 19 were preſent.

Mr. HAY begged leave to mention, that he had nothing more to ſubmit to the Court this day. It was his duty to furniſh the accuſed with a liſt of the Jurors, and their places of reſidence; but on account of ſeveral difficulties, it would be impoſſible to make out thoſe liſts before the day after to-morrow, which time, after ſome converſation, was agreed to.

He alſo obſerved, that it might be proper to have the names of the Jurors called over, though not impannel them at preſent. They were accordingly called; and of 12 ſummoned from Wood county, and 36 from the body of the Diſtrict of Virginia, as returned by Joſeph Scott, Marſhal, but two were abſent.

He then requeſted the Marſhal to deliver, as ſoon as poſſible, a correct copy of this liſt to the oppoſite Counſel.

Mr. P. RANDOLPH enquired, whether this was a proper opportunity for any man on that pannel to ſtate his objections to the ſervice.

The C. Juſtice replied, that it would be better to wave any objections, until the Jury were about to be impannelled.

Mr. HAY wiſhed ſuch of the witneſſes as had not appeared before, to be recognized as the others had been: and accordingly, Meſſrs. Duncan, Nevill, M'Dowell, and Peters, were recognized by the clerk.

The Deputy Marſhall was then about to adjourn the Court—when

Mr. BURR recalled the recollection of the Court to the mo-

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tion which he had made on a former occaſion for a ſubpœna *duces tecum*, addreſſed to the preſident of the United States. That motion had been partly complied with. He wiſhed to know of the Court, whether it was not a matter of right for him to obtain a ſubpœna *duces tecum*. If it was not, he ſhould lay a ſpecific motion before the Court.

The C. JUSTICE did not believe it to be the practice in Virginia to obtain ſuch a ſubpœna upon a mere application to the clerk: the motion muſt be brought before the Court itſelf.

Mr. HAY would ſay nothing on this ſubject, until he underſtood the object of the application. If it was to obtain the letter which was not formerly furniſhed, he would inform the oppoſite Counſel, that he had it now among his papers, and was ready to produce it.

Mr. BURR. That is one object of the application. Another is, to obtain a certain communication from Gen. Eaton to the Preſident of the United States, which is mentioned in *his* depoſition.

Mr. HAY was not certain whether *he* had that communication, but believed it was among his papers. If it was there, he would certainly produce it.

Mr. BURR. If after a ſearch, the gentleman finds that he has not the paper, will he conſent out of Court to iſſue a ſubpœna to the Preſident of the United States, under the qualification I have mentioned? I wiſh not at the preſent exigency, to derange the affairs of government, or to demand the preſence of the executive officers at this place. All that I want is certain papers.

Mr. HAY could not conſent to ſuch a meaſure: he would rather that it ſhould go through the regular proceſs of the Court.

Mr. BURR. Then, Sir, I ſhall move for a ſubpœna *duces tecum* to the Preſident of the United States, directing him to attend with certain papers. This ſubpœna will iſſue as in the former inſtance. I ſhall furniſh the clerk with a neceſſary ſpecification of the paper I require.

The Court then adjourned till Wedneſday, 12 o'clock.

WEDNESDAY, August 5, 1807.

Mr. HAY requeſted that the names of the witneſſes might be called over who had not appeared on Monday, and of whoſe arrival he was not yet informed, which was accordingly done: after which he obſerved, that the Court would perceive that the number of witneſſes attending, was greater than on Monday; that he preſumed the whole of them would be here in a few days; that he had no doubt they would go into trial during the preſent term; but that he could not now furniſh the accuſed with ſuch a liſt of the witneſſes as was required by law; for, though he knew their ſirnames, yet he was ignorant of the chriſtian names of

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many, and their places of reſidence. He was not certain to what day the Court might properly adjourn.

CHIEF JUSTICE. It is of no ſort of difference to the Court, whether it adjourn from day to day, or to a certain day.

Mr. BOTTS obſerved, that it was ſufficient for them to have the names of the witneſſes, without being particularly exact about their places of reſidence.

Mr. HAY. There will then be only one more circumſtance neceſſary to go into a trial: it is to know whether the material witneſſes are preſent. If gentlemen accept of the liſt which I am prepared to make out, we may perhaps go into trial on Friday. But I preſume, if other witneſſes may be ſummoned and appear, whoſe names are not on the liſt, that they may be added from time to time.

Mr. WICKHAM thought it might be material to know the evidence of ſome of the witneſſes, and ſuppoſed the Attorney for the United States could furniſh information neceſſary for aſcertaining that circumſtance.

CHIEF JUSTICE. All that we can ſay is, that if the liſt made out ſhould not prove ſatisfactory, the Court cannot proceed. Let the Court be adjourned till the day after to-morrow.

Mr. HAY ſaid, he would take the liberty of mentioning one circumſtance relative to the manner of proceeding in this trial, which might ſave the Court trouble, if it could be adjuſted before the Jury were impannelled.

The practice in Pennſylvania is the ſame as it is in Great Britain. After the reading of the indictment, the Counſel for the proſecution ſtate the caſe, and the facts on which it will be ſupported—Witneſſes are then brought, and examined on behalf of the proſecution—The Counſel for the accuſed next ſtate the principles of law on which they oppoſe the charge, and then exhibit their witneſſes—The Attorney for the proſecution then winds up the argument. This is the practice in Great Britain and Pennſylvania; but not ſo in Virginia, where a ſhort ſtatement is firſt made of the caſe, then the teſtimony on both ſides is exhibited, which is finally argued and commented on, by the Counſel on both ſides. It is almoſt indifferent to us, what courſe is purſued; though I ſhould prefer the former, becauſe it may contribute to ſave the time of the Court. It reſts with the Court to point out the ſyſtem which ſhall be purſued. I believe that in this ſtate, there never has been ſuch a trial as the preſent—a trial for treaſon.

Mr. WICKHAM. This is a point which has never occurred to us, and which has not been a matter of deliberation. We preſume that the general practice will be purſued: although certainly a deviation might be made, if there was any real neceſſity for it.

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CHIEF JUSTICE. I suppose the present motion will be brought up on Friday; but if in the mean time gentlemen can agree to any arrangement among themselves, it will most certainly meet the convenience of the Court.

Mr. HAY. The arrangement is an important one, not only in relation to this cause, (if we can see any end to *it*) but to several others of the same complexion. I am informed that Blennerhasset was yesterday brought to this city; and it is rumoured, that Mr. Dayton is in the neighbourhood.

MR. MARTIN presumed, that the same course would be pursued in a prosecution for treason as for murder.

CHIEF JUSTICE. We need not come to any arrangement at present; but, if gentlemen can agree on any mode among themselves by Friday, it will be acceptable to the court.

Mr. HAY. I shall beg leave to observe, Sir, that this case may be opened on Friday; and if the English mode be pursued, it will be opened in a different way from that which is pointed out by the criminal practice of Virginia. Is it not better, therefore, to adopt some previous arrangement on this subject?

Mr. WICKHAM. Certain habits are familiar to us all; and it produces a species of embarrassment, to depart from them in any degree. We are used, for example, to certain ways of proceeding in criminal prosecutions: Why, Sir, depart from them, or run into embarrassment? But it is time enough to decide this question, when the Jury shall have been impannelled. We should have time to deliberate on it, as well as to consult our client, in a case which may so materially concern him. [Mr. Burr was not this day in Court.]

Mr. HAY. The sole privilege of prescribing the order of proceeding, belongs to the court: and permit me, Sir, to observe, that if this arrangement is postponed till Friday, we may not then be prepared immediately to pursue that course which the court may prescribe. For this reason, therefore, I wish the court to make an immediate decision.

CHIEF JUSTICE. The court is unwilling to dictate any particular course; for, although I have read some books of practice, my opinion on this point is not finally made up. Perhaps the best system is pursued in great Britain, unless indeed, some other proceeding, had been previously established; and a long course of experience in that country, has, perhaps, attested its convenience. I am unwilling, to wave altogether, the practice of Virginia. That course which appears to me the best in this case, considering the great number of Counsel who are employed, and the benefits of reconciling the saving of time with the clear treating of the case, is perhaps the following: Let the case be fully opened on behalf of the United States, and the testimony on that side gone through. Let one of the opposite Counsel afterwards

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open the case on behalf of the accused, and the testimony on that side be fully exhibited: then one of the remaining Counsel for the United States may comment on the whole evidence, who may be answered by the Counsel for the accused; until, at length, the argument is closed by the remaining Counsel for the prosecution. However, this is a case in which I do not pretend to dictate.

Mr. HAY. Were this a solitary case, Sir, I should feel but little solicitude on the subject; but, as we have repeated labours of the same kind to undergo, I must confess that it is with much regret I hear the decision of the Court. The opposite Counsel have not so much labour upon their shoulders; because they are so numerous, that they may easily divide and reduce it.

Mr. BOTTS suggested the propriety of adjourning the Court till to-morrow, when some arrangement might be adopted on the subject.

Mr. HAY. There is this serious objection to the arrangement of the Court. I understand that after one of the Counsel has opened the case, he is to retire from the action, unless to cross-examine the testimony exhibited on behalf of the accused. Now how many Counsel are on the other side? five or six: perhaps as many as seven. And I understand you, Sir, that the two remaining Counsel among ourselves, are to answer them all. It would be a most oppressive labour upon the last, who winds up the prosecution, to be compelled to answer all those who preceded him; and, I should really suppose, that the first who opened the case, should be permitted to come in at the close of the argument.

Mr. MARTIN. We have no objections, Sir, if all three were to come in.

CHIEF JUSTICE. I repeat it, that I am not solicitous to adopt the arrangement which has been suggested. But as to the objection which has been urged, it seems to me, that the same argument will often be repeated by all the Counsel for the accused; and that, of course, the Counsel who closes the argument, will have nothing more to do, than to collect these arguments together, and answer them all at the same time. The labour cannot, therefore, be as great as has been represented. However, if the first Counsel wishes to come in, I certainly can have no objection.

Mr. WIRT. It is scarcely necessary, Sir, to call the Court together to-morrow, for this purpose alone. Whatever arrangement be adopted, we, Sir, shall readily acquiesce; if two gentlemen, at least may be permitted to divide the burden of answering six or eight.

Mr. WICKHAM said, there would not be so many.

The question was then waved for the present, and the Court was about to adjourn, when Col. Edward Carrington (of Rich-

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mond,) rose and informed the Court, that he had been so much indispoſed on Monday, it was impoſſible for him to attend: that his name having been called over on the Jury, and not having anſwered, he had conceived it incumbent upon him to pay ſo much reſpect to the Court, as to appear before it, and to account for his abſence. Whether he ſhould be able to ſerve hereafter, it was impoſſible for him to ſay.

The court then adjourned until Friday 12 o'clock.

FRIDAY, August 7.

Several witneſſes were preſent, who had not before appeared.

Mr. HAY regretted the abſence of ſeveral witneſſes; but informed the Court, that he was confident he ſhould be able to progreſs with the trial on Monday; and, therefore, hoped for an adjournment until that day.

Major SCOTT, (the Marſhal), begged leave to trouble the Court before its adjournment, relative to the expences which lay on him, for the ſafe keeping of Col. Burr. He had been, and continued at the expences of 7 dollars per day. What had been expended, he ſaid he did not regret; but objected to being ſaddled with its continuance, for, probably, a long time. He had received certain information, that the Secretary of the Treaſury would refuſe to ſign his warrant for the charge; and thus his whole abſtract would be returned, and unſettled. He was ſorry to be under the neceſſity to appeal to the Court; but, there appeared to be no other way of redreſs. The law only allowed 34 cents per day, and 50 cents per month.

Meſſrs WICKHAM, MARTIN and BOTTS obſerved, that they could not conceive that the Secretary would refuſe liquidating the account; after the court ſhould have ordered it. There was no wiſh on the part of Mr. Burr, that the Marſhal ſhould pay it out of his own pocket. On the contrary, they had aſſured him, and they now repeated that aſſurance, that he ſhould not; and, in the ultimate refuſal of his account, they would reimburſe him that expenditure. Could it be ſuppoſed that, amongſt the thouſands of dollars which this trial would coſt the U. States, the Secretary would refuſe this ſmall item, which was rendered abſolutely neceſſary for the accommodation and juſtice of the priſoner; who was removed from the common jail, becauſe of its loathſome and unhealthy ſtate, to the penitentiary; which, from its diſtance, was acknowledged by the gentlemen on the other ſide, would not ſuit the purpoſes of interview between Col. Burr and his Counſel during the trial. The Court had a right, under the act of Congreſs, to direct all neceſſary expenditures; and, therefore, there was no doubt it would be allowed.

Mr. HAY did not admit of having acknowledged the propriety of removing the priſoner from the penitentiary to the private

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houſe; and, indeed, he was much ſurpriſed to ſee it couched in the order by the Court.

Mr. E. RANDOLPH had a full conviction, that the Counſel for the proſecution did conſent.

Judge MARSHALL ſaid he limited the order, not on account of any admiſſion on the part of the Counſel of the U. States, but becauſe he thought it to be right. The argument to the beſt of his recollection was—that whatever ground might be uſed for Mr. Burr being near the Capitol during the trial there would be none during the vacation.

[Mr. HAY's remarks, according to our notes, were theſe:—"I do not perceive the neceſſity of theſe daily viſits, of which the gentleman ſpeaks. When the trial comes on, then it certainly will be neceſſary to have more frequent intercourſe with him: but, till that time, it is unneceſſary. They can communicate with him by letter, until the trial."]

The COURT declared its decided opinion, that any expence incurred by the Marſhal under the order of the Court, was juſtified by law, and would be allowed. There could be no diſpute between the Marſhal and the Secretary of the Treaſury on the ſubject. The Marſhal, having always monies of the U. States in his hands, would be undoubtedly juſtifiable to retain this ſum, which the Court have ordered him to expend, in his own hand. The reſort of the Secretary then, would be a ſuit; and, ſurely, there could not a court be found, but would decide in favour of the Marſhal. If any agreement could be made with the accuſed, it would be much the beſt.

Mr. BURR was ſorry for the neceſſity which occaſioned it to appear before the court; but, there could be no doubt of the juſtice of the demand on the United States, of all other contingencies of the court. He would, however, in the ultimate refuſal, agree to refund the expence. Arrangements could be made for that purpoſe after the adjournment.

He alſo obſerved, that he could wiſh, before the court adjourned, that there ſhould be named a certain day of trial.—This is the fifth day ſince the commencement of the court; we are ready for trial, and wiſh it to take place as ſoon as poſſible; it places me under very great inconvenience to be ſo long waiting. I could wiſh the proſecutor, or the court, if they ſee proper, would name a definitive day.

Mr. HAY. I declared my confident expectation that we ſhould proceed on Monday; and, unleſs ſome unforeſeen circumſtance ſhall prevent, we certainly ſhall be then ready.—Several more witneſſes have attended, and we may expect enough to go on by that day, for which every arrangement will be made.

Mr. BOTTS. We have forborne, through the whole of this long caſe, to ſay any thing on the ſubject of delay; we have done

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ſo, becauſe it ſhould not even be ſurmiſed that we wiſhed to puſh the trial until the proſecutor was fully ready. We have ſummoned a ſmall numbet of witneſſes; and it has been announced, that the Marſhal does not mean to pay them without the order of the Court. This may occaſion ſome of them to go away, by which we ſhall be prevented from our privilege. We ſhall feel gratified if a certain day, (the ſhorter one the better), could be fixed by the attorney: if he does not, I truſt the Court will take it in hand, and fix one.

Mr. HAY again aſſured the gentleman of his determination to proceed on Monday—nothing occurring, which he could not at preſent foreſee.

The Court adjourned until Monday.

MONDAY, Auguſt 10.

Dr. Wardlaw, one of the *venire*, made application to the Court through Mr. Wirt, to be diſcharged. His wife was in extreme danger, and a voyage to New-York might be the ſaving of her life. The veſſel was now waiting.

The CHIEF JUSTICE wiſhed to aſcertain, whether there would be any objection.

Mr. BURR declared that he ſhould remain paſſive during every application of the kind.

The COURT diſmiſſed the juror.

A certificate was read by Mr. M'Rae from Dr. Adams, ſtating the extreme indiſpoſition of Randolph Harriſon, another of the *venire*, who was alſo diſcharged.

A certificate was read by Mr. Hay from Dr. Upſhaw, ſtating that James Henderſon, another of the *venire*, was ſick of a bilious fever, and unable to attend. He was not diſcharged.

Mr. M'Rae read a certificate from Dr. Greenhow, ſtating that David Bullock, another of the *venire*, was unable to attend to the requiſite duties of a juryman through ſickneſs: He requeſted to be excuſed ſerving. It was granted.

Mr. BURR. I am now ready to proceed in the trial. But I beg leave to inform the Jurors, who I ſuppoſe are all within the hearing of my voice, that I have underſtood a great number of them have expreſſed their opinions on the ſubject of my guilt; that they have formed their judgment, and taken a bias, which ought, in reaſon and in law, to diſqualify them. I truſt that thoſe gentlemen, finding ſuch to be their ſituation, will, as they come up, voluntarily avow it. I ſtate this as a duty which every man owes to himſelf and to me.

The clerk informed the priſoner, that he was at liberty to challenge ſuch of the *venire* as he might object to.

The venire was then called over, and 43 anſwered.

1. *Hezekiah Bucky* was firſt ſummoned into court.

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Mr. Botts. He is challenged for cauſe. *Q.* Have you ever formed, or expreſſed an opinion upon the caſe of Col. Burr? *Juror.* I cannot ſay that I have ſince I have been ſummoned here. *Q.* But before that? *A.* Before, I have in my own mind.

Mr. Hay. I could wiſh the queſtions put, to aſſume a more preciſe and definite ſhape. If ſuch queſtions as theſe were to be put to all the jurors, I think I may venture to predict, that a jury cannot be got in Virginia; becauſe there is not a man who has not formed an opinion upon a point, which has been the ſubject of univerſal newſpaper diſcuſſion. Every one knows that this tranſaction has excited unuſual converſation; and there is not a man who has not engaged in it, and expreſſed his opinion upon the extremely intereſting documents which have been publiſhed. Does the gentleman mean that any perſon who has made up his mind upon the circumſtances as publiſhed, ſhould be diſqualified from ſerving as a juror? Such doctrine cannot be ſanctioned by this Court. It amounts, in my view, to a declaration that the priſoner is not to be tried. The doctrine preciſely is, that, if any man, by his outrageous conduct ſhall be able to make himſelf the theme of univerſal converſation, he might carry his crimes to any extent whatever: for as every body have talked about him, ſo no juror is to be found who have not thought about it. I will not pretend to preſcribe the form in which the queſtion ought to be put; but I muſt obſerve to the Court, that it is a queſtion of very great importance, and ought to be formed by the Court; as was the caſe in the trial of James Thompſon Callender.

Mr. Botts. We certainly conſider it as a misfortune forever to be deplored, that in this country, and upon this particular caſe, there has been too general an expreſſion of opinion. We did not require our ſenſibility to be raiſed upon this ſubject. We know that this generality of ſentiment in the community, will furniſh one of the greateſt poſſible difficulties in the way of a fair trial; but I did think that there were 12 men to be found in Virginia, who were ſo impartial and candid, as not to have expreſſed an opinion. I really hope the proſecutor is miſtaken, and that the cataſtrophe is not already fixed with every man in the community; ſo that he, whoſe fate they are to preſide upon, is to be convicted, right or wrong. If this impreſſion of the gentleman be true, it ought to be conſidered as the beſt poſſible reaſon, why their victim ſhould not be ſurrendered to them. I have however one miſerable conſolation left, Sir: that within the limits of the 48, we have confidence enough in ſome of them, not even to interrogate them upon the ſubject; and I cannot but indulge a hope that, even with this reſtriction, we ſhall, out of this pannel be lucky enough to find 12 *honeſt men.* I aſked this queſtion, becauſe I thought it would beſt ſuit the

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palate of the profecutor himſelf. The queſtion in Callender's caſe, which was propounded by an honourable Judge, who was afterwards tried for high crimes and miſdemeanours, (this being a part of the charge againſt him,) was—whether the juror had made up, and expreſſed an opinion on the guilt of the accuſed. In this particular caſe, if it ſhould meet the opinion of the Court, I think we ſhall have no occaſion to interrogate farther. On this ſubject we ſhall acquieſce in that courſe which might be preſcribed.

Mr. Hay. The queſtion in Callender's caſe, was not as expreſſed by Mr. Botts. It was, whether they had formed, and delivered an opinion on the ſubject-matter of the indictment, then about to be tried. Let the juror now be aſked, whether he has formed and delivered an opinion on this queſtion, to wit; whether the accuſed is guilty of Treaſon. Then we ſhall ſtand on the ſame ground as in that caſe. John Baſſet ſaid, he had read Callender's book, and had formed an opinion againſt him; but the Judge aſked the above queſtion as to the indictment, and he was received, becauſe he had not formed an opinion upon the indictment. We ſhall be ſatisfied with a ſimilar queſtion in this caſe. It is ſtated in the indictment, that the priſoner committed Treaſon on Blannerhaſſet's iſland: this is a ſpecific charge at a ſpecified place. Now, it is well known, that the tranſactions in which the priſoner is charged to have been concerned, in the public opinion, extended themſelves to numerous parts of the United States. It is very probable, that moſt of the jurors have not formed any particular opinion upon this queſtion at all. In order, then, to help them to anſwer ſpecifically, it is proper to put that preciſe queſtion to them, as to the crime charged, and the place mentioned, according to the indictment.

Mr. Burr. The party ought never to be confined upon any particular ſet form of queſtion. It is the duty of the Court to examine, whether he has made up his opinion or not. There are numerous caſes in the books, where queſtions of a different nature have been put to jurors. Mr. Baſſet, in Callender's caſe, ſays—that he had read the book, and had made up his opinion on it. This did not diſqualify him. So, in a caſe of murder, if a man had ſeen the murder committed, he would be a good juror; becauſe his mind could have no bias over his eyes. The declaration of Mr. Bucky is not yet compleated. By purſuing the queſtion, the Court will be able to decide, whether or not he is a proper juror.

Mr. Martin. There is nothing more certain, than that the law requires a juror to come forward with the moſt perfect and unequivocal impartiality. I am really very ſorry the gentleman has indulged his jealouſy on the impartiality of his own State;

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it is really a libel on the State of Virginia, to ſuppoſe that twelve men cannot be found, who will give an impartial verdict. I can never give credit to ſuch a declaration. What! not 12 men to be found in this extenſive State who have not made up their mind, but devoted the perſon to death upon ſuch kind of teſtimony as newſpapers afford! There is a diſſimilarity between this caſe and Callender's. There is a law that no man who had made up his mind upon the facts, except they are within his own knowledge, ſhould be put on a jury. Now Callender's caſe admitted of every man having made up his mind; becauſe it was an indictment for a libel in a printed book, which every body could read, and ſee the nature and tendency of. But here who knows what the evidence might be: no teſtimony has yet appeared; and what may appear, no man can foreſee. But, ſays the Gentleman, the crime charged is Treaſon: has the juror made up his mind on *Treaſon?* Sir, I am ſure they have not; becauſe very few of them know what Treaſon is. The true queſtion is, Sir, whether they have come here with their minds *poiſoned*; and not, whether they are lawyers enough to know what treaſon is. Has the juror made up his mind whether Col. Burr has committed any offence at all, is the true queſtion. It is the province of the *law* to point out what that crime is.

Mr. Botts would leave the queſtion propoſed by Mr. Hay to the ſame inferences which himſelf had formerly drawn, upon the poſſibility of a juror's underſtanding the nature of the offence charged againſt a priſoner, unleſs upon a previous inveſtigation of the fact. As to qualification, he would quote 3 Bacon, 258, that a juror was to be objected to, "*if he has declared his opinion touching the matter.*" Hawkins ſtates, that if the juror has ſaid that the accuſed be *guilty*, or that he deſerved to be *hanged*, or to be *puniſhed*, or expreſſed himſelf in any other way, ſo as to leave room for ſuch inferences, he is not qualified. In Smith and Ogden's caſe in New-York, a juror had expreſſed himſelf —"that as for Smith, he ought to have ſome favour; but as to Ogden, it was no matter how much he ſuffered." He was ſet aſide. In the caſe of John Fries, 42, appendix, on the queſtion for a new trial, on the ground of one of the jurors previous declaration, Judge Iredell gave his opinion perfectly conformably to this doctrine.

Chief Juſtice Marshall. It might be proper to apprize the gentlemen of the bar with the general impreſſions on the mind of the Court, and their views of the ſubject in its preſent ſtage. It is certainly one of the moſt important principles towards the promotion of juſtice, that thoſe who are to paſs upon any trial, are to be fully and clearly unbiaſſed in every reſpect; and open to be governed by the evidence that *may* appear, and to the law upon the caſe, and thoſe only. If it be *poſſible*, therefore, to

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produce such men for jurors, they ought to be produced. If it be not possible, yet, those men who come predetermined *in any* respect, for or against the prisoner, generally, are unfit, because they do not feel themselves free to act. This is a principle of natural justice; it is also a principle of that common law which we have received from our ancestors, and which I trust we shall abide by. The same principle of right and justice is secured to us by the Constitution of the U. States. I will not say it was adopted by the framers of that instrument, because they found that principle in full force and efficacy. The language of our constitution declares, that "in all criminal prosecutions, the accused shall have a right to a speedy and public trial, by an impartial jury." No person can deprive him of that right: and those who summon the jury, are bound by their conscience and oath of office, to obey the same mandate of the constitution: The object of it is, that the jury should be perfectly impartial. Now can it be said to be impartial, whilst the juror has declared his opinion that the prisoner is *guilty* or *innocent*; that he ought to be punished, or that he ought not? If a juror has made his declaration upon part of the testimony, it is so much the worse; because he must be supposed to have declared upon it without the facts: he having *decided* without his legal knowledge of the testimony. He is, therefore, peculiarly unfit for a juror. There perhaps might have been a general expression read. The question to suit such a case would be,—"have you *formed*, or *delivered*, an opinion on the case of Col. Burr?" Every man has received impressions; but those impressions, if they are not strong, might not disqualify him. A man for instance, might think that he is actionable; might think that he is wrong; or, that he is not. It might not extend to the merits and full nature of the case for which the prisoner stands indicted: if it does not, the juror might be said to be fair; because his mind is free to receive further impressions. The question should therefore ascertain, whether he has any opinion formed or not, on the case, as it is.

As to the particular case which has been quoted, Mr. Baffet had read the book. He declared that he was of opinion, that the book was a libel; but, he had no opinion whether Callender was, or was not, the author of that book. Suppose, in the present case, a man should be asked—"is it treasonable to overthrow the government of the United States?" "Yes my mind is made up upon this subject." "But do you believe, or have you formed an opinion, that the prisoner at the bar is guilty of that act: that he did assemble a body of men at a certain place to accomplish any act of that nature?" His mind might not be formed to answer this question, either affirmatively or negatively; because he might wait to hear the facts stated, and the law on the subject

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expounded to him, to make this fact treason or not. Now, take it in this view: Every man might have formed an opinion as to the treasonable nature of certain acts; but, it is the application of that treason to the individual, that makes the opinions of the juror objectionable.

The Counsel will go on with the questions.

Mr. Botts, to the *Juror*. Did you form and express an opinion that Col. Burr was guilty? *Juror*. I did not. *Q.* What opinion did you form upon Col. Burr's case? *A.* I only formed an opinion from the general rumour. *Q.* What was that opinion? *A.* Why that any man, acting in the way in which he was said to act, ought to be hung, for it would save the lives of thousands.

Mr. Burr. Did you express your opinion that Col. Burr was that man? *Juror* I did, from general clamour.

Mr. Hay. I am to understand then, that the mode used in Callender's case is overruled.

C. Justice I am not sure how that is: it is so generally, but not particularly, as to the indictment itself.

Judge Griffin. I think the question related to the matter in issue.

Mr. Hay. I wish it to be understood, that I differ with the gentleman at the bar: but all that I object to, is the establishment of a position, that the question shall relate to the particular individual.

Mr. *Wirt* to the *Juror*. Did I understand that you had heard a rumour of Col. Burr's conduct in your country; and that, upon these rumours you expressed your opinion that the man who had so acted ought to be hanged? *A.* Yes: that was my opinion.

Q. But, if you were to be sworn upon this pannel, would you form your opinion upon this rumour, or would you require complete evidence of his guilt? *A.* Complete evidence, to be sure. *Q.* Have you ever formed an opinion, whether Col. Burr committed Treason upon Blennerhasset's island? *A.* I cannot say that I have; all that I know, is upon rumour.

Mr. MARTIN observed, that it was impossible to conceive that this was an impartial juryman.

CHIEF JUSTICE. We cannot receive such a juror. [*Set aside.*]

2. *James G. Lardley* was next called, and desired to answer upon such questions as he had heard put to the former juror. *A.* I have expressed my opinions relative to the prisoner at the bar some time past, unfavourably.

COURT. Have you formed any opinion upon the indictment? *A.* I have not heard the indictment; my impressions of him was, that he was guilty.

Mr. MARTIN. Did you receive that opinion from the news-

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papers? *A.* I did. COURT. Do you recollect expreſſing ſuch an opinion before this time? *A.* Yes, at different times. *Q.* Did you ſay that he ought to be hanged? *A.* I do not recollect that I did: I may have ſaid ſo: I generally expreſſed myſelf that he was guilty of Treaſon. [*He was ſet aſide.*]

3. *James Compton* was called.

Mr. BOTTS. Have you ever formed, and expreſſed your opinion upon the ſubject of the guilt of Col. Burr? *A.* Yes, from hearſay. *Q.* Did you expreſs an opinion that he was guilty? *A.* Yes, from what I underſtood, I have.

COURT. Did you underſtand him to be guilty of the crime of Treaſon? *Juror.* I never knew him to have been guilty of any thing elſe. [*Set aſide.*]

4. *Hamilton Morriſon* was called. I have frequently talked with other people: I do not particularly recollect the words I expreſſed; but, from the ſtatements that were made by different gentlemen, I conſidered him, if they people ſpoke the truth, to be guilty. I never knew any thing of Mr. Burr myſelf.

Mr. Burr. Have you never expreſſed any opinion about it? *Juror.* No, ſir, never that I know of to my own knowledge. I only thought from clamour, that it might be ſo. *Q.* Did you expreſs it as your opinion, from what you heard, that he was guilty? *A.* I did ſay that if theſe things were true, he was guilty; and that I was ſorry it ſhould be ſo with any gentleman. *Q.* Did you mean by that to infer your belief that it was true, and that you were ſorry for it? *A.* I do not know; but, I did rather believe it to be true, at that time. I ſpoke mighty little about it, as I was in no public office.

Mr. M'RAE. Then you never gave a poſitive opinion? *A.* No, ſir. *Q.* Only if thoſe things were true? *A.* Yes. I never in my real heart condemned him; becauſe I never knew what his determination was.

Mr. WICKHAM. Did you ever expreſs a belief that he was guilty? *A.* I will not ſay that I did not ſay he was guilty; I believe, from my impreſſions, it was that if theſe facts were true. I cannot charge my mind with that: I would not be qualified. *Q.* Has this ever been a ſubject of converſation with you? *A.* Why, ſir, at the time that this happened, I was in Alexandria. *Q.* But have you not liſtened to converſation on this ſubject? *A.* Yes. *Q.* Well, was it your impreſſion or not that the charges were true? *A.* I do not know that it was: it was always a doubt in my breaſt. Mr. BOTTS. Do you recollect ever ſaying that he ought to be puniſhed? *A.* I have ſaid that, if he was guilty, he ought to be puniſhed.

Mr. MARTIN. Did you think this from public rumour, or how? *A.* I was in hopes that there was not ſo much truth in it. I cannot ſay either way as to any poſitive expreſſion.

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Mr. Drew, deputy-marſhal, was called and ſworn, as to what he might have heard the juror ſay. Mr. Lardly, Mr. Conwell, and Mr. Bucky were alſo aſked; but neither of them had heard expreſſions of any kind, reſpecting the priſoner, from him. His examination was *poſtponed*.

5. *Yates S. Conwell* believed that he had expreſſed his opinion. By the reports that he had heard, he thought that he *muſt* be guilty of Treaſon. *Court.* Did you ſay ſo? *A.* Yes. [*Set aſide.*]

6. *Jacob Beeſon* had formed his opinion upon the ſubject of Col. Burr's guilt: his opinion was formed upon newſpaper publications, and upon the circumſtances which occurred upon other information. He had borne arms againſt him; and, from all his impreſſions, did not feel at liberty to ſerve. [*Set aſide*]

7. *William Prince* declared himſelf to be of the ſame opinion with the laſt juror. He had borne arms to ſuppreſs the meaſures on Blannerhaſſet's iſland, and deſcended the river in ſearch of Blannerhaſſet. [*Set aſide.*]

8. *Nimrod Saunders* had expreſſed opinions previous to being ſummoned on the jury. He had ſaid that Mr. Burr was guilty of high treaſon. [*Set aſide.*]

9. *Thomas Creel* was called.

Mr. Botts. Have you any declaration to make? *A.* No. *Q.* Have you ever formed, and expreſſed your opinion upon the guilt of Col. Burr? *A.* No, I have not, to the beſt of my recollection. *Q.* Did you not ſay that he ought to be puniſhed? *A.* No, I never did. *Q.* Have you ever borne arms to go to Blannerhaſſet's iſland? *A.* Yes, I did. *Q.* Did not you expreſs yourſelf at that time? *A.* I expreſſed myſelf in this way: that Burr was a ſenſible man, and that if there was any hole to creep out of, he would find it; and that he had made a tool of Blannerhaſſet in the buſineſs. I did not at that time, know whether there was any crime at all committed, but I ſuppoſed there was.

Mr. Burr. Then you did ſuppoſe that Col. Burr had led Mr. Blannerhaſſet into a ſcheme, or ſomething? *A.* I did, and I did think it was not very right. *Q.* But did you not think, at that time, that he ought to be puniſhed for it? *A.* Why, I did not know, I ſaid that if it was fact, what I heard, and that there was a crime in it, you ought to be puniſhed.

Mr. M'Rae. Did you ever expreſs yourſelf about the fact, abſolutely and poſitively? *A.* No, I never did. *Q.* Did you never form an opinion about it? *A.* No, I never did.

Mr. *Wickham.* Did you not think that there was a crime in his conduct; treaſon or ſomething? *A.* I could not ſay what crime it was. I do not think I ever formed an opinion about it. *Q.* Did you think Col. Burr or Blannerhaſſet the moſt guilty? *A.* I think that Blannerhaſſet was more to blame than Col. Burr, becauſe Blannerhaſſet was well to live, and Burr's caſe was a deſperate one; therefore I did not blame him at all. Mr. *Wick-*

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ham. A man who makes such a declaration as this is not fit for a juryman in any case, because he wants a knowledge of the distinctions of right and wrong.

Mr. *M'Rae.* Then you suppose Mr. Burr led Blannerhasset into this? *A.* I supposed he had. I had that opinion; and that he was the cause of Blannerhasset's guilt. *Q.* Have you ever expressed that opinion? *A.* I think I have frequently; I never, as I know of, did speak much about it; but I always thought that Mrs. Blannerhasset led her husband into it, and that Mr. Burr was the cause of it all. Mr. *Wickham*---have you ever said that you thought that Mr. Burr deserved to be punished? *A.* Perhaps I have said that if he was guilty he ought to be punished. *Q.* You have said before that you believed him to be guilty? *A.* Guilty of what? *Mr. Wickham*---Guilty of all the mischief. *Juror*---No, I have not. *Q.* Have you ever expressed an opinion that he ought to be punished? *A.* I never did.

Mr. Wirt---I understood the opinion of the court to have been, that a man having formed an indefinite opinion, as to the facts or guilt, was not enough to disqualify him.

Chief Justice---That is the opinion of the Court.

[The Juror was *set aside* for further examination.]

10---*Anthony Buckner*---I have oftentimes said that Colonel Burr deserved hanging for his conduct, from the rumours and clamours that are through the country. [*Set aside*]

11---David Creel had only formed his opinion from the statements that he had seen in the newspapers: and, if these accounts were proved to be true, he certainly was guilty of treason. This he had often said; and further, that he ought to be hanged. [*Set aside.*]

Question by *Mr. Botts*---Do you know what your brother, Thomas Creel's opinions upon this subject were? *A.* I cannot say that I do, or that I ever heard him say any thing positively upon it.

12. *John Horace Upshaw*---I have had impressions rather unfavourable to the prisoner. I do not know that they can be called opinions, because they only arose from such evidence as newspapers can afford. I do not know that I am prejudiced: I believe not.

On *Mr. Burr's* rising to challenge Mr. Upshaw for cause,

Mr. Hay observed, that he really apprehended that the exposition which appeared to be assumed from the opinion of the Court, would exclude the United States from being able to bring on a trial. He has *impressions*, but he could not venture to call them opinions: they were not enough deep-rooted to merit that appellation. Now, sir, who has not formed impressions; but these are not prejudices, for the juror disavows that principle. Whatever may be supposed of me, (and I think every honest, candid man would feel the same), I verily believe that I myself could make an impartial juror in this case. If you exclude all the in-

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habitants of this ſtate who have impreſſions, one way or the other, where will a man be found to try the cauſe? Shall it be ſaid that any impreſſion upon the guilt of the priſoner ſhall diſqualify? If that principle is adopted, it will be as well for me at once to enter a *nolle proſequi*.

Mr. WICKHAM---Then, every honeſt, intelligent man, Sir, is a competent juror in this cauſe, if Mr. Hay's doctrine is juſt, let his impreſſions be what they may. Now what is the effect of this doctrine? Why, that prejudiced men may ſit on the jury. Now Mr. Hay himſelf is a very honeſt, candid, and intelligent man, and he has flattered himſelf that he could ſit impartially on the jury in this caſe. But I have not that confidence in him, I muſt confeſs, which he poſſeſſes in himſelf; and eſpecially when I remember a moſt diſqualifying expreſſion which he has often uſed ſince the commencement of this caſe, to wit: that he had no doubt whatever of the guilt of Col. Burr. Did our challenging theſe imply that they were not honeſt and intelligent men? And do we ſay ſo? No, Sir, we only diſpute their partiality. A man may have a number of excellent qualifications about him, but he may not be impartial as to this caſe. But, ſir, I will ſay one thing. I will ſay, that the moment an honeſt and intelligent man ſhall diſcover his mind to be biaſſed from ſtrict impartiality, he will expreſs it, and object to ſit upon this jury, becauſe of his diſqualification. I really believe, that there have come from Wood county, ſome men who are very honeſt; but it is evident, that they have ſaid ſo much, that they cannot be called impartial jurymen. This gentleman undoubtedly deems himſelf an impartial juryman.---We want to diſcover whether he is or not; but this does not impeach his integrity.

Mr. HAY--I never meant to inſinuate, that where a man had formed an opinion, he ought to be on the jury; but I do ſay, that where a man comes before the Court with mere *impreſſions*, he ought not to be rejected. If it be ſo, the inevitable conſequence will be, that there can be no trial.

Mr. Wirt to the *Juror*---I underſtood you, ſir, that your mind had received *impreſſions*, but that they had not aſſumed the character of *opinions*? *Juror*---I ſaid ſo, Sir. I did not know how far I might be correct in calling them opinions, becauſe they were deduced from evidence, ſuch as cannot always be relied on. I have expreſſed theſe impreſſions, occaſionally, and with conſiderable warmth. *Mr. Wickham.* Did you ever give your opinion as to the charge in the indictment? *Juror*---Not as to the guilt of Treaſon. *Mr. Martin*---What expreſſions did you uſe? *A.* I do not recollect them. *Q.* Were they, that he ought to be puniſhed? *A.* No, Sir, not that I know. *Q.* Was it as to his guilt? *A.* I think it may be ſo called: it was that he entertained a treaſonable deſign: I am not, however, certain that they went ſo far; but I do not doubt that theſe were my impreſſions.

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Mr. M'Rae. Did you ever form or deliver an opinion positively, concerning his guilt of treason? *Juror.* I do not recollect that ever I did, one way or the other. I have farther in another way, however: I have vindicated the characters of those witnesses which have been impugned: for what ideas I may have formed from the subject, were drawn from what appeared from the affidavits of General Wilkinson and General Eaton.

Mr. Hay thought, that if this juror could be denounced as partial, every man in the community must.

Mr. Martin and *Mr. Wickham* spoke a few words on the subject.

Chief Justice. No doubt there are many men in the State of Virginia who have not formed their opinion upon the present case. The difference lies in the nature of the impressions received; whether they are slight, or whether they are strong on the case. Now it rests on the approximation of those impressions to opinions that declare their nature. It is very much the case with some gentlemen who have come forward before. The Court is not prepared to say, upon the statement Mr. Upshaw has made, that he has made up his mind, or that he is an improper juror.

Mr. Burr. The Court might not have heard Mr. Upshaw speak respecting the treasonable design said to have been formed. I really am sorry that we have heard the court told so often, that it was our wish that there should be no trial; and that, according to the rules laid down, there could be no jury impannelled. Now, Sir, I know that there are hundreds of men in Virginia who could sit impartially to try this case.

[The examination of Mr. Upshaw was postponed.]

13. *William Pope.* I have formed opinions upon all the circumstances, and, I believe, I have delivered them pretty generally. I first had an impression that Burr's object was to make his fortune in the western country: that he meant to go and take up certain lands, and obtain settlements to be made upon them. But afterwards, I discovered that he intended to attack the Spanish provinces: This, of itself, was not all; for it soon appeared that the scheme extended farther. I must say, that I felt sorry that he should be guilty of such a thing; a man who was once in such high favour with the public. I know not but this will be called prejudice; but, whatever it might be called, I think that I could perfectly divest myself as much as mortal man could, and try him with the most strict impartiality. I must say, that I feel prejudiced against the act of Treason; but, whether the prisoner has committed Treason or not, I cannot say: for I have very often said, that there would be a difficulty in proving the overt act; and have rather supposed, that more would be necessay to be proved than could be. My impressions are rather unfavourable.

Mr. Wickham. Have you been a candidate for a public office and now elected a member? *Juror.* Yes. Q. In the course

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of your converſation round the country where you were canvaſſing, did you expreſs any opinion about Col. Burr? *A.* I did. *Q.* Did you ſay that the government acted right in proſecuting him: and expreſs your opinion, that he was guilty? *A.* Yes: I believe that I have ſaid that he was guilty, and thought that he could be convicted of high treaſon. [*Set aſide.*]

14. *Peyton Randolph* ſaid, that it was never his wiſh or intention to ſhrink from the performance of any public duty; but on this occaſion, he had a ſtrong and unconquerable motive for wiſhing to be excuſed ſerving on the jury. He had taken the oaths as a practitioner of law in this Court. This he believed was always underſtood to exempt from jury-ſervice, if it did not go entirely to diſqualify.

The Chief juſtice admitted the privilege, except the priſoner ſhould poſitively interpoſe to retain ſome of the *venire*: and in this caſe, a conflicting privilege would be called into operation.

Mr. Burr, ſaid he ſhould be paſſive. [*Excuſed.*]

15. John Bowe. I do not recollect that I expreſſed any opinion as to his being guilty of Treaſon; but I expreſſed my belief, that he was guilty of ſomething hoſtile to the government.

Mr. Burr. I have underſtood that you went farther than that. *A.* Perhaps I might; I do not know: but I have been very cautious ſince I found that you were to be tried here.

Mr. *Botts.* Then you have thought that he had been guilty of ſomething, the legal character to which crime you could not affix? *A.* Yes.

Chief Juſtice. I can ſee no objection to ſuch a juror as this.

Juror. I will go farther: I will ſay, that if what I had ſeen in the paper was true, he muſt be guilty.

Chief Juſtice. Was your opinion confined to the mere impreſſion of guilty of ſome crime, or did it extend to this capital offence of Treaſon? *A.* I have ſtated, that if what was ſaid was true, (and the verdict of the Grand Jury ſeemed to coincide with that impreſſion), that he was guilty of treaſon; but I never made up my mind.

Mr. *Wickham.* Did you uſe any expreſſions on this ſubject, or impreſs your opinion upon others when you were going about canvaſſing, (for I underſtand you are a delegate to the Aſſembly.)? *A.* I was very reſerved at that time, and ſaid but very little. I have frequently ſaid, that if he was guilty he ought to be hung; and if he was innocent, he ought to be clear. That I wiſhed him to have a fair trial. I thought that he was guilty of ſomething to deſtroy the peace and happineſs of the country.

Chief Juſtice. Did you ever form an opinion that the priſoner at the bar was guilty of raiſing troops to make war upon the U. States? *A. Yes.* *Q.* Have you ever expreſſed that opinion? *A.* No, not that I can recollect.

Mr. *Burr.* Taking the whole together, it makes out the chal-

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lenge completely. He had formed an opinion that Col. Burr was guilty of ſomething which the law deſignates to be Treaſon, and which in his mind amounts to treaſon; but he had not made ſo wide a declaration.

Mr. M'*Rae* explained it to be, that if what was written in the paper was true, that then in his opinion he was guilty: but of this he was doubtful.

Ch. Juſtice. He went on to ſay that he did believe him guilty, but he did not expreſs it.

Mr. *Hay.* Has your conduct been diſtinguiſhed by any particular zeal againſt the priſoner? *A.* No. Sir, I was very cautious. [*Examination poſtponed.*]

16. *John Roberts* was willing to declare, that he had expreſſed his ſentiments reſpecting the deſigns of Col. Burr; and thoſe impreſſions were made upon his mind from news-paper publications, and from public report.

Mr. *Botts.* Have you expreſſed your opinion as to his guilt? *A.* I have thought him guilty of Treaſon and have expreſſed it. [*Set aſide.*]

17. *Joſhua Choffin* was *excuſed*, on account of indiſpoſition of body.

18. *Jarvis Starrs.* The ſtate of my mind is much like thoſe who have gone before me. I have been much in the habit of reading newſpapers, and I have freely expreſſed my opinion on them. I have repeatedly ſaid, that if Gen. Eaton and Gen. Wilkinſon had written the truth, that he would be guilty of Treaſon.

Mr. *Burr.* But have you not expreſſed that opinion without this qualification? *A.* very probably I have, the Lord knows what I have ſaid: nothing is more probable, than that I have ſpoken in various ways. My general opinion was, that Col. Burr was plotting ſomething injurious to the U. S. I ſay that, *if theſe publications were true*, he certainly was guilty of Treaſon on Blannerhaſſet's iſland.

Mr. M'Rae. But did you ever form an opinion that he aſſembled a body of men, and committed the crime of Treaſon at Blannerhaſſet's iſland? *A.* Only from what I have ſeen in the papers.

Mr. Martin. But did you not credit theſe reports? *A.* The ſtrong impreſſions I have in my mind reſpecting them, diſqualifies me from ſerving with impartiality. [*Set aſide.*]

19. *Miles Seldon.* The proſecution againſt Col. Burr has been the topic of general converſation in this neighbourhood, and I have entered into it as freely as any body. I have taken up ſtrong prejudices that he has been guilty of ſomething injurious to the U. States, and declared that if he, or any body was guilty of Treaſon in this happy country, he ought to be hanged.

Ch. Juſtice. Have you ever formed an opinion, whether or

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not Mr. Burr was guilty or innocent of the crime charged? *A.* Only from the views I have received of the ſubject, which were gathered entirely from publications. I am not, however, afraid to truſt myſelf, if you are not afraid to truſt me: for I have confidence, that I could render a fair verdict.

Mr. *Botts.* Then you cannot recollect any thing in particular that you have ſaid? I cannot: I have ſpoken fifty times.

Mr. *Botts.* It will be neceſſary to call a witneſs to remind you *Juror.* I am ſure I ſhall have no objection: I ſhall be glad if any one can remind me of any thing that I have ſaid. *Q.* Do you recollect ever ſaying, that you believed Mr. Burr to be a traitor? *A.* I do not: I may have ſaid ſo, but I do not know it. *Q.* Do you recollect having any diſpute with one Gothey, on the ſubject? *A.* Perhaps you may allude to a converſation I had with Col. Mayo. I have often joked with him on the ſubject. I remember having told him, that it was a federal project, and that Col. Burr was ſet upon it by the federaliſts: but this was a mere joke.

Mr. *Baker.* Do you recollect ſaying, that Col. Burr ought to be hanged, and all the federaliſts with him; or, however, the leading federaliſts? No. [*Examination poſtponed.*]

23. *Lewis Truehart,* had made up his mind partly, from public reports, that Mr. Burr was doing ſomething hoſtile to this country.

Mr. *Burr.* Have you frequently expreſſed yourſelf ſo, or ſaid you believed theſe reports. *A.* I have expreſſed myſelf, but not more than any other man, I did not ſay, that I did declare my belief in thoſe reports.

Mr. *M'Rae.* Do you recollect ever being poſitive in it. No, indeed.

C. Juſtice. Have you ever declared, that the priſoner at the bar was guilty of treaſon againſt the United States? *A.* I never did. I could not poſſibly give that opinion without the evidence. I have ſaid, that I conceived he was doing wrong: what that was I know not.

Thomas Tinſley was called in, and ſworn to give evidence, whether he had ever heard Mr. Truehart expreſs himſelf on the guilt of Col. Burr. He depoſed that ſome time ago, before the Grand Jury found a Bill, when in company with Mr. Truehart, a number of obſervations were made; from the general tenor of which, he was induced to believe, that Mr. Truehart had impreſſions particularly unfavourable to Col. Burr. He ſhould never have thought of this: but finding that he was on the *venire,* he was impreſſed with the impropriety of his being a juror; becauſe he conſidered him to be prepoſſeſſed.

Mr. *M'Rae.* Do you recollect any particular expreſſion that he uſed.? No, I do not.

Mr. *Hay.* Have you ever came acroſs a man in this country,

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who has not expreſſed himſelf. *A.* I do not know, indeed. I do not recollect any particular expreſſion he uſed.

C. Juſtice. The Court does not imagine, that a mere expreſſion of opinion is ſufficient.

[*The Juror was put aſide for further examination.*]

21. *William Yancey* pleaded his ſituation as ſheriff: in which office he had to perform much important buſineſs, beſides attending the Courts. He begged to be excuſed. He then proceeded to expreſs the ſtate of his mind reſpecting the tranſaction. He had made declarations frequently and abſolutely, that, if the newſpapers were correct in their repreſentations of the circumſtance, Col. Burr was guilty of ſome conſpiracy or other, which was very injurious to the U. S. He was always very cautious to declare upon this proviſo, that the newſpapers told the truth.

Mr. Botts. Do you not think that in ſome converſations, you might have expreſſed your belief that the newſpapers were true? *A.* I might: I cannot ſay as to that.

Mr. Martin. Did you, or did you not pay a credit to the newſpapers on this ſubject? *A.* I have thought, that if theſe ſtatements were made clear, he was guilty undoubtedly; and I have nothing elſe to make me believe to the contrary at preſent. *Q.* Then you believe thoſe ſtatements, 'till you are better convinced? Yes.

Mr. Hay. If you are on the pennel, will you not be governed by the evidence that may be brought before you? Certainly I ſhall, Sir. *Suſpended.*

22. *Thomas Proffer* ſaid that he had made numberleſs declarations: he believed Col. Burr to be guilty of the *intention* of committing Treaſon, but he had not made up his mind on the guilt of Treaſon: nor, indeed, did he believe that he had committed the Treaſonable act itſelf. His mind was in a perfect ſtate of ſuſpenſion on that point.

Mr. Wickham. Have you ever expreſſed your opinion? *A.* I do not know; perhaps I have; but if ſo, it was juſt in that way. I do not believe that he has committed the crime of Treaſon.

Mr. Martin. This is enough to ſet any man aſide. He believed him to be guilty of the *intention:* all that now remains, is to prove the fact, and that fixes the guilt. He has got one half the way towards a conviction already!

Mr. Wickham. Was this a mere *impreſſion*, or a *belief?* *A.* Sir, I cannot ſay that my mind had been ſo far governed, as that what I ſaw in the paper could have created a *belief.*

Ch. Juſtice. The Court is of opinion, that the caſe is not completely evident in Mr. Proffer's ideas as to the guilt. His examination is *poſtponed.*

23. *John Staples.* I have been under the ſame general impreſſions with thoſe gentlemen who have ſpoken before me.

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Mr. Martin. Have you expreſſed yourſelf; and what have you expreſſed? *A.* I cannot poſſibly recollect. *Mr. Baker.* Have you ever ſaid that you believed Col. Burr was guilty? *A.* I dare ſay I may. *Q.* Of what? *A.* I cannot ſay as to that. *Q.* Do you mean guilty of levying war, and of raiſing troops; and have you declared your opinion upon that? *A.* Yes: I have made up my mind that he is guilty, and I believe I have expreſſed it. [*Set aſide.*]

24. *Edward C. Stanard.* I acknowledge that my prejudices are deeply rooted againſt the priſoner. Although I doubt whether he has committed the overt act, yet I am confident as to his criminality of intention. My objections to him have been ever ſince his conteſt with the public for the Preſidential chair. I regret the loſs of his talents, becauſe they might have been turned to the uſe of the U. States inſtead of promoting diſcord. I have doubted his committing the overt act, becauſe I have always conſidered him to be a man of ſuch inſidious intrigue, that he would not jeopardize his own life, nor commit any act in which he would be found out, until thouſands ſhould fall before him. [*Set aſide.*]

25. *Richard B Goode.* I have never ſeen nor heard any of the evidence reſpecting Col. Burr, but from newſpaper and common report. I have formed my opinions unfavourable to him; and that bad opinion of him has been ſtrengthened by what I have heard from himſelf in this court. But if I know myſelf, I think I have formed no opinion but what the evidence would eradicate; ſo that I could decide fairly on the trial.

Mr. *Baker.* Did you not endeavour to get Capt. Heath removed from the command of a troop of Horſe, becauſe he was one of the Bail for Col. Burr? Mr. Goode related the circumſtance which appeared to have originated in Capt. Heath refuſing to expreſs his confidence in the Preſident of the United States, at a troop-meeting previous to the 4th July. On which account, and on his having been bail for Mr. Burr, Mr. Goode had refuſed to again entruſt himſelf under his command, (though himſelf an officer in the company): which declaration he had communicated in writing, wherein were words to this effect: That he could not have any connection with a man who had ſanctioned a traitor to his country by becoming his bail. [*Set aſide.*]

26. *Nathaniel Selden* declared, that he had formed his opinion as to the intentions of Col. Burr, and he was more and more confirmed in that opinion; but particularly, from a view of the depoſitions of Gen. Eaton and others. He had alſo expreſſed that opinion. He had, however, ſeen no evidence that the act of Treaſon was committed; but that he had an intention of committing it was evident. Theſe opinions, and theſe only, he had expreſſed. [*Set aſide for further examination.*]

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27. *Eſme Smock* ſaid, that he had formed and expreſſed an opinion that Mr. Burr was guilty of treaſonable deſigns.

Mr. *Wickham.* Do you ever recollect going farther than that? *A.* I do not know that I have. *Q.* Have you formed an opinion generally, as to the Law and the Fact? *A.* No, I do not know that I have. *Q.* Have you expreſſed any opinion? *A.* I do not recollect. *Q.* Have you formed any opinion? *A.* Yes, I have.

Mr. *Wickham.* Well, he has formed an opinion that he was guilty, and he has formed and expreſſed an opinion that he was guilty of treaſonable intentions. [*Set aſide.*]

28. *Richard E. Parker.* I, like every one in the ſtate, have received ſome impreſſions on the ſubject. I have heard very little of the evidence, but I have read the newſpapers, as others have done; and have believed, that if the ſtatements in the newſpapers were true, Mr. Burr was guilty—not of Treaſon, becauſe I have not formed my opinion on that ſubject; but, of ſome deſign contrary to the intereſt, laws and happineſs of the U. States.

Mr. *Burr.* I ſhall not object to Mr. Parker: his impreſſions do not amount to an objection: he is therefore *Elected.*

A long converſation enſued here, as to the propriety of ſwearing the juror. Mr. Hay wiſhed him to be ſworn immediately, and contended for the propriety of reſtraining his intercourſe with the community. He ſuggeſted inconveniencies that might ariſe: amongſt other inconveniencies, perhaps, a motion for a new trial only on this very ground.

Mr. *Wirt* alſo ſupported the argument for ſwearing the juror; as to what was to be done with him after, it might better be decided when the reſult was diſcovered.

Chief Juſtice ſuggeſted his intention to take the ſtate practice of ſwearing four at a time. This cauſed ſome further converſation. The counſel for the proſecution objected to that mode:—The counſel for the priſoner contended, that, as there was no law of Congreſs on the ſubject, the rules of common law or ſtate practice muſt prevail.

Chief Juſtice. The Court conſiders itſelf as adhering to the common law of the land, when it ſwears four at a time. This practice will be followed.

29. *John W. Ellis.* With reſpect to Mr. Burr's deſign of committing Treaſon, I have not had a doubt, nor do I entertain one at this time. Whether he has committed it or not, I have not had it in my power to diſtinguiſh.

Mr. *Hay* and Mr. *M'Rea* here again ſuggeſted their impreſſions, that an opinion on the *deſign* of the priſoner could not diſqualify a juror.

Mr. *Martin* ſaid, that all they wanted was an *impartial* jury; but how could a man be denominated impartial, when he had already half made up his mind. Here is the intention proved to the views of the juror; but an impartial juror always views the

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accuſed as an innocent man, until there ſhall be produced *proof* of his guilt, as to act and intention. All then that ſuch a juror waits for, is to have his views of the intention to be removed; or, on the other hand, to have the act proved, and then he is ready to give a verdict. Sir, this *impartiality* in jurors is what the conſtitution ſolemnly pledges to us, even in a charge of aſſault and battery. How much more neceſſary in an high crime?

C. Juſtice. The opinion of the Court is, that there is a material diſtinction between a perſon who has expreſſed an opinion as to the guilt, and one who has merely formed an opinion as to *intention* of guilt. The one undoubtedly would be rejected. But it has not yet decided whether a perſon who has formed an opinion about intention, ought to be rejected. *Q.* Does your opinion go to the priſoner throughout the tranſaction, or to any particular period or circumſtance? *A.* Throughout the whole; I think his deſign was to commit Treaſon. [*Suſpended.*]

30. *Thomas Stark* had, without any expectation of ever being called upon this jury, declared that Mr. Burr was guilty of High Treaſon, and this was his opinion. [*Set aſide.*]

31. *William White*, in May laſt, was in the Weſtern country, and from what he had heard there, as well as ſeen in the papers, he was induced to ſay, (tho' at that time never expected to be called upon) that he had no doubt but Col. Burr was guilty of Treaſon, and ought to be hanged; or, that hanging was too good for him. [*Set aſide.*]

32. *William B. Chamberlain.* I ſtand, perhaps, in a moſt ſingular ſituation. Mr. Wickham has obſerved, that any man who has made up his opinion, or who had declared that the priſoner deſerves death, is unfit to be any juryman at all. Now I have ſaid that Mr. Burr deſerved death. Whether I am fit for a juryman or not, I know not; I only know that I ſtand as high, and as impartial as that gentleman. I have uniformly believed that Aaron Burr deſigned treaſon againſt this country. I have believed, and do now believe, that he never committed it. I have declared (though it was only in a joke), that if I was put on the jury, as it would be a long trial, that I would go to ſleep, and at laſt awake up, and give a verdict of guilty. However, this was only in joke. I have ſeriouſly declared, that if he was innocent, I would acquit him. I may have made many declarations, but only as to the intention. I think I could impartially paſs between him and the country.

Ch. Juſtice. The court cannot indulge ſuch jokes on a ſerious ſubject. [*He was ſet aſide.*]

33. *David Lambert* pleaded indiſpoſition as his excuſe. He had no opinion, as he recollected, on the ſubject. [He was *excuſed.*]

34. *William Hoomes.* I have expreſſed my opinion moſt freely and repeatedly on this ſubject: every thing I have ſeen or heard,

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convinces me of his treasonable intentions; and I have very probably made declarations as to the treason itself. [*Set aside.*]

35. *Overton Anderson.* I have expressed my opinions very frequently, but it was merely on newspaper testimony, and by the [illegible] impressions surrounding me. I have said that he had acted inimical to the happiness of the U. States.

Ch. Justice. Have you ever formed or expressed your opinion, that he was guilty of treason? *A.* I do not know that I have.

Mr. *Burr.* Have you not frequently expressed opinion as to my guilt? *A.* Yes, I have; I have said that you ought to be punished.

Mr. *M'Rae.* Have you formed an opinion as to the charge in the indictment? *A.* I cannot say that I have.

Mr. *Martin.* Have you formed an opinion as to levying war, or disturbing the United States, or the like? *A.* I do not know that I have; I never heard any evidence.

Mr. *Burr.* When you expressed your opinion, what transactions did you apply it to? Was it to overturning the government; dividing the union; collecting of men, and the like? *A.* I did, perhaps.

Mr. *Burr.* That compasses the whole facts charged. [*Set aside.*]

36. *Hugh Mercer.* The opinion which I have entertained for a long time past, is friendly to a strict and impartial examination into the case of the accused. I do not know that I have ever seriously expressed any thing as to his guilt or innocence, not being acquainted with the testimony which might be produced.—[*Elected.*]

37. *Jerman Baker.* I have entertained, and very repeatedly expressed unfavourable opinions of Aaron Burr; and I have done it with much warmth, because it is my temper to be warm on any thing that strikes me forcibly. I have thought that he intended to commit treason; but, as to his having committed it or not, I have no distinct impression.

Mr. *Burr.* Have you not expressed yourself as to my guilt?—*A.* I have certainly a very bad opinion of you, and have had for a long while; and this I have often expressed when called upon, and often when not. I have an opinion, that you entertained treasonable intentions; but whether they were committed or not, I am not well enough acquainted with the law to determine.—[*Set aside.*]

38. *Edward Carrington.* This is a subject which has attracted the attention of myself, as well as, I believe, of most persons since it first commenced. I have read newspaper accounts, and other information has not escaped my notice. There have been a number of measures stated as the object of Col. Burr's attention. One has been a project to invade the territories of Spain,—another to obtain a dismemberment of the Union,—but I do not know, that I have ever been able to form an opinion upon it;

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but, I must declare, that upon the whole, I have always been under unfavourable impressions. But whatever my own impressions have been, as it is customary with me, on transactions which I cannot ascertain the object of, I have said but little. There is another subject which appears to be intimately connected with this enquiry, relating to the measures at New-Orleans. It has been made a question, whether the measures taken there by Gen. Wilkinson were proper or improper. I think that I have expressed myself in this way on that topic: that it was impossible for any person at this distance, to form the least idea on the subject; but certainly, that if Gen. Wilkinson did sincerely believe what he said he did believe, it was undoubtedly proper for him to consider it an *extreme* case; and consequently, to use *extreme* measures. He must, therefore, be justified in using the measures which he did use. But upon the whole. I thought it was a subject too remote for me to venture to say any thing about. I do not know that I have ever reduced my mind to a point on that subject, or on the subject of Col. Burr's guilt.

Mr. *Burr*. Is there any settled general prejudice, of a more antient date, colonel, in your mind, against me, than that transaction of the Western country? *A*. No, Sir, none at all. [He was *elected*.]

The four Jurors elected, were then called forward to be sworn; viz.—Messrs. Parker, Lambert, Mercer, and Carrington. Previous to being sworn, *Mr. Parker* wished to make a few observations, by way of explaining what he had before stated; so, that if there was any objection to him, it might be now made; and particularly as some gentlemen had been rejected upon an expression of principles somewhat similar to his own. To avoid a misunderstanding, therefore, he would state, that strong impressions, unfavourable to Col. Burr had been, and still were entertained by him. He had frequently in conversation declared, perhaps warmly declared, these impressions. It was true, that they had been formed on Newspaper evidence; about the truth of which, he had not formed an opinion: but, as to other testimony, he could not say, because he had not heard the evidence of a single witness. If he had been called upon to state his impressions on the depositions, he certainly should say that he believed them to be true until they should be proved not so. He believed that Col. Burr had been engaged in enterprizes contrary to the laws and interests of the U. S. Concerning the doctrine of Treason, he had formed no settled opinion. He wished the gentlemen to ask him any questions which might satisfy their own minds.

Mr. Burr. I see no reason from the candour of Mr. Parker, to ask him any questions. He would rely upon his integrity and honour. They were then sworn.

39. *Robert Haskins* believed that he had expressed an opinion;

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but to what extent, he knew not. On being interrogated, he said he believed him to be guilty; perhaps he said he was guilty of the intention of Treason, and that he deserved to be hung. He could not remember particularly what he had said. [*Set aside.*]

40. [redacted] *R. Fleming.* I have formed an opinion, from newspaper information, and frequently expressed it, that he certainly had some treasonable intention in view. That was my belief, and still is.

Mr. *Burr.* Did you make any general declaration that you considered me guilty? *A.* Yes, Sir, I believe I have. *Q.* As to the intentions, and actions? Yes, I have. [*Set aside.*]

41. *George W. Smith* pleaded the same right of exemption which Mr. Randolph had been excused upon. He was a practicing Attorney in this Court; and besides, he had some important business in another Court, now sitting, to attend to; which had rendered his absence from it extremely inconvenient. *Mr. Hay* pleaded for his discharge. The *Court* said that this privilege would be incontestible, unless the prisoner should urge his conflicting privilege.

Mr. *Burr* requested that the Juror attend to morrow.

Mr. *Smith* hoped that the urgency of his attendance upon another Court would plead for his immediate discharge. He must, however, submit, if required. It would not now be improper, however, to state his general impressions on the subject now before the Court. He had always been extremely cautious, and ever solicitous to avoid forming any prejudice, or even opinion, as to the prisoner; or to express one. This reservation he conceived to be peculiarly applicable to the present case: he should always, however, give up his own opinion, where well-informed men would come forward to prove contrary facts. It was, however, to the newspapers, which he had read upon this interesting subject, that he attributed his information of the circumstances which had taken place, and these publications had produced an impression upon his mind. In consequence of this, he had declared that Mr. Burr was certainly guilty of something inimical to the happiness and peace of the U. S. and probably to the Laws of the U. S. Whether his crime amounted to treason, or only to a misdemeanor, he had not formed an opinion; nor had he examined the Law upon the facts which had been exhibited: and where the government commences a prosecution against any individual, it was always very necessary to suppose, that there was a preponderance of prejudice. He was however, disposed to think this, from the evidence which had been published, and the proceedings which had taken place in the other wing of the Capitol, that it was a subject of a military nature: that a military expedition was certainly about to be set on foot; and that the crime must amount to a misdemeanour.

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He had formed an opinion upon the whole, that there was no ground to conclude that an overt act had been committed.

42. *Armistead T. Mason* had formed no deliberate opinion as to the actual commission of treason: he had seen no evidence upon this case, but, it was his opinion that if Col. Burr did not mean to subvert the government, he certainly meant to divide the union. [*Suspended.*]

43. *Dabney Minor.* As to the intention of Mr. Burr being unfriendly to the country, he had no doubt; and, he believed, he had expressed himself so: but, as to the overt act he would not pretend to say.

Mr. Botts. Did you ever say he was guilty, and ought to be hung? *A.* Perhaps he might at first, but it was now out of his recollection, if ever he had.

Q. Do you recollect ever having conversation with Mr. M'Coul on the subject? It is said that you said so to him. *A.* I do not know that ever I have as to the fact, but as to the intention I perhaps have. [*Suspended.*]

Those whose examinations were suspended were to be disposed of on the next day. There ensued some conversation on the question, what was to be done with the four jurors that were sworn. Mr. *Hay* contended for the propriety of keeping them from mixing with the people at large. Mr. *Martin* supported his declaration, that it was unnecessary to lock them up: that in the cases of Hardy Tooke and others, juries were not compleated in the same day, and the jurors were all to go at large under their oath, until they were all impannelled.

The *Court* saw no necessity to place them in custody.

Mr. *Burr* said, that if it was necessary to express his acquiescence that the Jurors should be at large, he would willingly do it.

Mr. *Hay* said, he did not accept of the assent.

The *Court* permitted the Jurors to go at large, and then adjourned.

TUESDAY, August 11, 1807.

Mr. *Martin* said, that before the re-examination of those witnesses who were set aside took place, it was their desire to make a few observations on the situation in which laws of the Country required jurymen to be, in order to give an honest verdict.

Mr. *Burr* said that with respect to Mr. Smith, who had claimed an exemption, he should wave any objection, and leave it to his own wishes, if the Court should be willing to excuse him. There certainly existed a considerable difficulty to get men of impartiality, which was to be lamented; and the more so, when such men presented the exemption of privilege. As he had before declared his disposition to be *passive* on such subjects, he should remain so.

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Mr. *Smith.* I should have no objection to serve, if I had not a number of causes in a Court, which I have been obliged to continue until now, from my absence. The importances of these causes makes it a necessary duty for me to attend to them without delay.

Ch. Justice. Mr. Smith must be allowed the privilege, as his attendance is not claimed by the prisoner.

Hamilton Morrison, was again called. Thomas H. Neale and James Henderson were called as witnesses, to say, whether they had ever heard the Juror declare any thing touching Col. Burr. They answered that they had not, to their recollection. They were also asked the same respecting Thomas Creele. They were not certain, but did not remember any thing.

Mr. *Morrison* said, that he was a man that always kept himself from talking about this case. It was very unpleasant for him to serve, where there was so much doubt of his impartiality.

Mr. *Burr.* Did not the public conversation in your country, influence your prejudice against me? *A.* No, Sir, *Q.* Have you none now? *A.* No, Sir, I declare it openly; but it is very disagreeable for me to be doubted.

Mr. *Botts*, Are you a freehold? *A.* Yes. *Q.* Are you worth 300 dollars? *A.* Yes, I have a horse here worth half of it. *Q.* But have you another one worth the other half. *A.* Yes, four of them: You may ask any of my neighbours. I am not surprized at Mr. Burr objecting to me; my name may be a terror to him,—my first name being *Hamilton.*

Mr. *Burr.* If I had no other reason for challenge the last word is sufficient.

Thomas Creel was discharged by the Court.

Horace Upshaw was called.

Ch. Justice. Is the impression which you state yourself to have received, relative to Treason, or to any other crime? *A.* My impressions relate to those transactions said to have occurred in the Western country. *Q.* Did your impression relate to Treason. My impressions have been various, and have changed upon this subject, as various lights of evidence have presented themselves; because, in such a complex scene, it was impossible for any man to form a definite opinion. It was my first impression, that Mr. Burr's views were entirely centered in the settlement on the Washita. But my succeeding impressions led me to suppose, that he intended to make a conquest of Mexico. Subsequently, I had my ideas led to suppose that, in order to effect that object, he certainly intended to take New Orleans. These have been my successive impressions from the evidence which I have seen.

Court. Did these opinions extend to the close of the transaction; or were they limited to any particular period? Was that last impression retained? *A.* I aver I never did believe, after he left

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the mouth of Cumberland, that he meant any attack upon New-Orleans; but until that time, I did. I cannot particularly recollect when that idea was formed, or when I changed it.

Mr. *Wickham.* Have you from all these ideas and impressions, come to the result that Col. Burr was a bad and dangerous man? *A.* That is certainly my impression.

Mr. *M'Rae.* Have you ever formed, or delivered an opinion that the prisoner was guilty of Treason on Blannerhasset's island? *A.* I do not know that I have.

Mr. *Baker.* Have you never, in your own country, undertaken to demonstrate that Col. Burr was guilty? *A.* I dare say I may have done so. *Q.* That there was strong presumptive evidence of guilt? Yes, very probably: for I know that I have vindicated the energetic measures of the government in the destruction and discovery of those schemes.

Mr. *M'Rae.* Have you any personal enmity against Aaron Burr? *A.* Not the smallest. *Q.* Does your impression arise from any other ground, than that of supposing that he has entertained treasonable designs? *A.* Not the smallest.

Mr. *Burr.* Had you not some prejudices against me anterior to these rumoured transactions in the western country? *A.* I certainly was possessed of unfavourable impressions against you ever since the presidential election in 1801.

Mr. *Burr.* We will stop examining this Juror further, or the remaining ones, until the argument is gone through, which we mean to open on the qualification of jurors.

Mr. *Martin.* Then Sir, I rise to shew, that by the laws of our country, and upon common law principles, that we are entitled to have a jury of impartial persons, in all cases whatever, whether of a civil or a criminal nature; which is not merely given us by common usage or common law, or by the laws of our own country; but, which is secured to us in the most unequivocal manner by our constitution.

Mr. *M'Rae* hoped the gentleman's indulgence would be granted for his interference; but he suggested, that it might save time, as well as bring the subject into a more compact situation, by taking the examination of the Jurors that remained, before the arguments were introduced. If an argument was to be held on each particular case, he thought it would be a much greater waste of time, than to hold one general argument on the principle at last.

Mr. *Martin.* I have been interrupted, Sir, because the gentleman has discovered, in his infinite wisdom, that we mean to make twelve different speeches! I wonder when he found this out? Has he the omniscient power of diving into our hearts, for discoveries of what we mean to do? And this is all to economize time! Yes, Sir, we have had many instances of the gentleman's mode of economizing time. I know pretty well what kind of

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economizing principle they would eſtabliſh: they would prevent Col. Burr's counſel from all the means of his defence, while they ſhould enjoy the opportunity of ſaying all they can; and, if you let them take their own way, they would have him hung, to gratify themſelves and the country. But this ſort of economy will not do for us.

Mr. *M'Rae.* That is a moſt *unfounded, unjuſt* and *illiberal* obſervation.

Mr. *Burr.* I did not conſider Mr. Upſhaw as barely involved in this principle: there are ſeveral of the other jurors who have ſaid that they believed me to have had treaſonable deſigns or intentions.—I think that conviction is declared by nine of the jurors. I do not ſee the neceſſity of renewing the examinations at this time, until the argument proceeds, involving the principal caſes.

Mr. *Hay.* I hope the argument will proceed: and I hope Mr. Martin, nor any other gentleman, will indulge themſelves in making uſe of expreſſions that are, in themſelves, *malicious* and *groundleſs*: that he will not feel himſelf at liberty to ſay that it is *our* wiſh to deprive them of the opportunity of defending the priſoner. I cannot but feel ſuch obſervations as a groſs inſult. We declare unequivocally, that we wiſh to proceed with the trial with all poſſible ſpeed and propriety.

Chief Juſtice. Nothing can be more irkſome, than for the Court to hear any departures from the principal caſe, in order to animadvert on a ſubject irrelevant. It can anſwer no good purpoſe, and it cannot be juſtified by any rules of propriety. The Court do not like to hear animadverſions on the government of our country; and, it undoubtedly ought to, and muſt reſtrain all ſuch licences, whenever taken.

Mr. *Burr.* It will be recollected, that during the whole of this proceeding, I have manifeſted my marked diſpleaſure at any perſonal attacks, or obſervations or any thing like it on the government: I have not a doubt but that diſpoſition will be allowed to me by the counſel. I have not only reſtrained it in myſelf, but I have moſt earneſtly deſired my counſel to reſtrain themſelves in any ſuch wiſhes, had they poſſeſſed them. They will bear me witneſs that ſuch has been the courſe of my deſires to them, whatever might be the provocation. I feel perſuaded that on the part of my counſel it will altogether ceaſe, for it can do no poſſible good: and I hope that no provocation will take place on either ſide. It will not have any tendency to promote the cauſe of juſtice, and can only prolong the time, which I hope it is the deſire of both ſides to uſe to the beſt advantage. He repeated, that he hoped no alluſion whatever would be made to any thing which had paſſed; and he would be reſponſible on the part of himſelf and his counſel that no occaſion of cenſure ſhould occur.

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Mr. MARTIN said, he had not the least wish to wound the feelings of any individual; nor did he wish to have occasion so to do. If gentlemen wished to avoid these recriminations, they should be careful to avoid the occasion, by wounding others' feelings. But really he could not tell what to think, or to what motives to ascribe some things which he had heard and seen, since he had been in the defence on this case. He might, possibly, be too much in the habit of plainly expressing his own feelings.

As to the question now in controversy, if he was right in the principle he wished to establish, and which he believed to be perfectly consonant with law, his remarks would go to the situation of mind of every one of the gentlemen who we proposed for jurors, and who had not yet been decided upon. He meant to say, that in all cases (but infinitely more important is it, where the reputation, honour, and even life of a person is at stake), the jury ought to be perfectly indifferent, impartial, and free from the least bias and prejudice. These words, and these feelings, were familiar to the honest heart: And this was what the laws and constitution of our country would always require. Their intention & their language is, that every person criminally accused, should have a jury, which, when they come to be sworn, stand perfectly indifferent; that every man of them should *come to court* to receive his impressions during the trial, and not bring them with him; that they should be all received from the evidence which *might be delivered*, and not from what has been heard or seen: and that, under the solemn sanction of an oath. Is it possible that the laws and usages of Courts, can contemplate a man to be an impartial juror, who comes with his mind already prepossessed against the prisoner; and requires strong evidence to be given, to eradicate these impressions, to bring him to the pure, unbiassed state where a juror ought to stand, when he is sworn? A juryman ought not to take his impressions to the Court; and he ought never to possess any, except what are given by the evidence of facts delivered in Court. 1st vol. of Reeves's History, p. 329, and 2d do. p. 446, amply describe this, when speaking of the particular duties of Courts and Juries. It says, that they ought to be indifferent; free from all influence; persons not even suspected of influence; nor procured for any particular partial purposes. In Carey's English Liberties, 245 and 248-9, we are informed what is meant by an impartial man: "He must stand indifferent, as he stands unsworn:" free from all *bondage, relationship, obligation, affection,* or *prejudice*: Totally indifferent as to the event, or any idea whether the person was guilty or innocent; for the Law presumes every person to be innocent, until his guilt be proven at a fair, impartial trial. I do not understand the half or quarter prejudices or partialities, which seem to be justified.—It is not sufficient to say, that this person is not above an half, a quarter, or three fifths as much prejudiced as another; because

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the laws and justice require that he should not be biassed, prejudiced, or partial *at all*. The Constitution of our country has given us this sound and valuable maxim; and, from its own inherent provisions we are assured, that even no Court of Justice or law can take it from us: "That in all criminal cases, the accused shall have the benefit of a speedy and public trial, by an *impartial jury*." Thus we find, that every man must be impartial when he comes to the book. But the counsel on the other side, appear to me to misunderstand the business. They have alledged, that if the objections which we have made, be continued, that there cannot be a jury found in Virginia; and, that he must be tried by such a jury as can be got, even if it be partial, or not at all. Now, if I understand the doctrine of the law at all, it is, that he *must* be tried by an impartial jury; or, not at all, until such a jury can be found. A gentleman is not to be tried and hung, because there is not an impartial jury to be found. I wish this to be considered as a serious case; and if the laws and practice favour cases of common property, by requiring that every juror be impartial—how much more applicable must they be to a case, where the life of a man is at stake. I, for my part, do not see the great necessity for a gentleman to be tried, and to suffer, merely on this account; when, if he was to have a fair trial, he might be acquitted. It never has been thought in England, that a man ought rather to be tried by a *partial* jury, than not at all.—They have put the article of trial on its right footing. If the state of the public mind is so far contaminated, that a fair trial cannot be had, it may be the cause of putting off a trial. 2 M'Nally, 667, rule 7, speaks of the effect which might be left upon the public mind by publications; such as newspapers, &c.—by which a general prejudice might be excited against the person; or, where a partial statement of the evidence was given to the public. He referred to the case of the king against the Dean of St. Asaph's, and the case of Brookes and others, where a continuance to another term took place, on account of public pre-impression. And why was this done? Because, out of that public who had read these things, the jurymen were to be taken. Then, if persons who might have came as jurymen in these cases, were to be considered as incapacitated because of the comparatively trifling bias publications might have made on their minds—how much stronger is the case, where persons declare that their minds have been made up for years, and that they possess a strong bias against the prisoner? The only reason why those cases were put off, was because a sufficient number of jurors could not be collected out of the public to insure a fair trial. Now let us apply this doctrine to the present case, and examine the premises. Is there one of these jurors whose examination has been postponed, who comes here indifferent in the case before them?—Here are certain specified acts of treason charged in the indict-

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ment; but, what do they say about these? Although they do not identically declare to have made up their minds upon these acts, nor perhaps either of them, yet are they indifferent as to them? Treasonable views, and treasonable designs, undoubtedly go very far into the conduct. Some of the gentlemen say, that they are convinced that his purposes were dangerous to the United States. Some go so far as to say, treasonable purposes! It is already defined by them, that it was intended to destroy the peace and happiness of the Union; and although they do not affix a name to the transaction, yet the Court will inevitably give it that shape. Can a juryman come forward free from prejudice, when he himself declares that he has decided upon half of the crime? Treason consists in certain acts being done, and of a certain intention to do those acts. The act might be done innocently; which, coupled with the intention, would constitute the crime. Thus 20 or 30 boats may meet at Blannerhasset's island, and 20 or 30 men be in each boat, each having his rifle; and all of it be innocent. But, if there should be such a meeting with a treasonable intention, and that intention be proved, it gives to the transaction another feature. Well, here is the attorney who comes forward with confidence, and declares that treasonable acts were committed by the prisoner at that place; and the jurors have already told us, that they have made up their minds as to the treasonable intention: all therefore, that is to be done with these jurors, is to prove that the acts were done there, and the whole guilt is fixed at once on the person charged. Ought a juryman to have such a prepossession as this? What does the law require of a juryman? It certainly supposes him, when sworn, to have no knowledge whatever, nor ideas about the *intention* of the prisoner whom he is called to try, more than of his *acts*; and as intention constitutes a part of the crime, and a principal part too, the juror's mind cannot be fairly occupied with it. He ought to be free from prejudice as to designs, to qualify him to act. The indictment states the charge at Blannerhasset's island. Now we will suppose the overt act to have been committed there, but that there is no proof of Mr. Burr being there—Here is the juror's mind prepossessed with an impression that Mr. Burr intended treason, and it is proved that he had some connection with that circumstance, by advising, or some other way; this would be enough with such a juror to return a verdict. It is similar to a case of Burglary. Suppose a man charged with that crime: The juryman says, that he had made up his mind, that the person intended to steal the property in that house; but, he has not made up his mind, whether the man got into the house: Proof is brought, then, that the man was in the house, and the juror is prepared to convict him of felony; when, perhaps, the man was perfectly innocent. Here we see the danger of coupling a prejudged impression of intention, with an act

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which in itself might be blameless. On the contrary, it ought to be proved that this house was entered feloniously. Again: Is not any man prejudiced, who should say that he has long thought Mr. Burr a dangerous man? Does he not come with his mind open to believe every thing that can be said against him? It is really a subject of deep regret, that the public mind is in this situation. To a certain degree, I think it is; but, I cannot believe it is by any means to that extent, which the gentlemen themselves seem to apprehend. I do not consider the 48 persons summoned on this *venire*, as a fair specimen of the people in Virginia. I should be sorry, indeed, for the character of the state, and for the fate of any unfortunate creatures who should fall under their power, if there was more than one man in an hundred so disposed, that merely from *Newspaper* articles, corrupt as they are, has more than half made up his mind in a case where the life of his fellow-citizen is involved. If such be the state of the public mind here, I should indeed think it no cause of exultation to me, if I had been born in it. Our Law says, that when a man suffers his mind to imbibe prejudice in that manner, it implies a degree of malice; and, that no man of justice and humanity ought to suffer his mind to be thus poisoned: for every person ought to be presumed innocent: which is not the case with this out-of-door, extra-judicial conduct.

And how came this upon the public mind? Did we sit down abusing of ourselves? Did we engage the Alexandria Expositor so long ago as March last, to commence inflammatory publications about ourselves, or to speak of the designs of Col. Burr upon the Spanish Colonies? No, Sir; those who have done it, will have it to answer for. If they have created such a ferment in the public mind, as that the prisoner cannot have a fair trial, and he should lose his life, they must abide by the consequence of such an unjust proceeding. And not only was it thus created, but the gentlemen themselves have kept up this prejudice. What was more commonly heard at the examination of this case in June last, than to hear the attorney declare the guilt of Col. Burr? He, with all the confidence in the world—with numerous repetitions, spoke of his guilt, and the certainty of his being able to prove it. Now was this calculated to allay the extreme ferment which then agitated the public universally? Was this the way to get an impartial jury? Was it to be supposed that this jaundiced opinion would cease, when the public heard such confident declarations from a gentleman, who must be supposed, from his office, to possess a better knowledge of the evidence than any body else? No man can be said to stand indifferent, who has attended to these things with confidence and belief. The Constitution and the Law forbid that any jury of our country should be composed of such materials; and, I trust, the Court will not suffer it.

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Mr. Botts. The question to be considered by the Court, is so important as to its immediate tendency, and so infinitely important as a precedent, that I should rather time was thrown away upon it, than that there should be a risk of the slightest error. Every crime consists of a number of constituent parts: in some a greater, in some a lesser number: which may be found out by analysis. Now when a juryman shall say that he has made up his mind upon a number of those component parts, which the analysis distinguishes; and, respecting one or two remaining, he should say he had not committed---can such a man be a good juror? Can he be supposed to be without bias on the question of crime, or no crime? Is he free from prejudice? I confess that it is scarcely possible for me to conceive that such a subject as this can be discussed to the satisfaction of the Court; because, if a man may conceive that he is not biassed, when, perhaps, he really is, there is no course of ratiocination which can make out a complete evidence of facts. I have thought it a case in which self-evident propositions must prevail. The *intention* is certainly a most important feature in the crime. Now fix upon 12 men for jurors who have made up their minds as to the intention, and you deprive us, probably, of half of our defence; for, when a man is set to the bar to be tried for his life, he has a right to insist that he had no guilty intention; and, therefore, plead that his crime was not compleated. But of what avail is it for him to plead his innocence, if his guilty intention is already fixed in the juror's mind? With what face could we stand before a jury with our arguments of his innocence? Could we say, that he had committed no act at all? If he committed any acts, they must be supposed to be bad, because the intention was bad. His acts will come before the Court in a more solemn shape; but solemn indeed will be our reflections on his case, if the jury that should try him, be so predetermined on his fate. I have read of a case, where a juryman was exempted, because he had declared that the accused ought to suffer; not death or any particular punishment, but couched in the equivocal term---to suffer. That was enough; and it ought to be enough to disqualify. And are these cases less meriting that decision? Suppose one of these jurors to have said so, what could we say to him? "You say that he ought to suffer; that is fixed in your opinion; it is only now for you to receive a slight impression, and then it is ascertained to your mind, what degree of suffering it should be." Have we not by such prejudged opinions, the most important avenue to our address compleatly stopped up?

It ought not to be inferred, Sir, from what we have said, that there is any danger from delay. We have manifested a contrary disposition; and, we have not a doubt, but we shall be able to proceed with the trial. Col. Burr's imprisonment bears so heavy upon him, that we are not without our apprehensions,

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that, desirable as it would be for us to have an impartial jury, strictly so, he might be forced to accept some jurors against his wishes, and give up the idea of a perfectly unbiassed jury. All that we can reflect on that circumstance is, that the public mind is so fixed with impressions, which nothing but an evident proof of guilt ought to have given.

Mr. BURR rose merely to narrow the argument, and not to extend it; as he wished no kind of delay, and was sorry any should be made. Whether there be, or not, public excitements to my prejudice, is not now the question; although the fact is obvious, and undeniable. But I wish this to be put out of the question altogether. Again: analogies have been taken from cases of treason: I wish such may be forborne, as not applicable immediately. If not forborne, I wish very little use to be made of them; and that the Court, at least, would forbear, lest they may be construed into opinions. It is, however, necessary for us to consider some possible cases, as a kind of land-mark to this decision. Suppose we instance a person slain: the act of slain is acknowledged: it is known. It may have been a justifiable act; it may have been a clergyable felony; or it may have been murder. The venire is called, and what say the jurors? why we know the man was killed; but we do not know how. Undoubtedly such was an impartial declaration. But suppose any thing of the intention is expressed: the murder is ascertained, and the intention is charged. It requires a very slight shade, in such a mind, to pronounce upon the guilt. Equally dangerous in this case would it be, to accept of a juror whose mind was already made up on the intention.

Mr. M'RAE. It never has been my wish to lose sight of the point under the consideration of the Court be what it may; and to travel out of the way for the purpose of making any observations, either to defend the government, whose conduct requires no defence, or to wound the feelings of the prisoner. And I am equally averse to, and have most cautiously avoided on all occasions, making any remarks to wound the feelings of the counsel by whom we are opposed, or to excite their least resentment. Frequent as have been the occasions in which I have been strongly tempted to deviate from this desirable course, I have studiously avoided these sensibilities, except at one period, when, in a small degree, I did submit to follow so blameable an example. On the present occasion, harsh and severe, unmerited and unprovoked as the animadversions of Gentlemen have been, I will so highly respect the admonition of this Court, as not now to comment upon them: I will go the course which the Court have marked out as proper; but, while I do this, I must make one remark, which is—that I shall not forever pursue the same course, if forever I am to be provoked to deviate from that excellent admonition, which has been given over and over again,

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but very little regarded. I shall deem it my duty to notice again, the unprovoked attacks which may in future be made, either upon the government, or upon ourselves, from whatever quarter it might come. But I trust that no occasion will occur, and that the case may go on with that respectful complaisance which is due to the Court; and, more especially, in a case of this description.

It may be unnecessary, perhaps, for me now to state what my feelings and my wishes in this case are. I declare to the Court, before this people, and before the God of my being, that I never have felt, from the commencement of this prosecution until the present moment, that infamous, that worse than diabolical disposition which he must feel that delights in his fellow-creatures' misery or misfortune. In no situation of my life can it be proved, that I have an heart of that character. I do most earnestly wish—I pray that the prisoner may have a fair and impartial trial, in every identical point, and before an impartial and unprejudiced jury. If any man on this jury feels any prejudice, he ought not to be impannelled; and if there be such, I hope they will lie over—whether one, or more, or even all; and, that an impartial, unbiassed jury will be found. This desire regards not the prisoner only, but any who may in any future period of time fall under such a charge; and that the severe scrutiny of this jury may operate as a precedent to future Courts. But, Sir, I do not mean by this to recommend an over punctilious enquiry; for it is impossible, but that every man must have formed some ideas of such a transaction, which filled every one's mouth. Those therefore who have not been prominent in forming and expressing their ideas, ought to be impannelled.

It is unnecessary now again to read authorities, because they are not controverted; but, there is a material difference between us, as to the application of them to the cases now before the Court. If any man be biassed through partiality, ill-will, near relationship, or the like affinity, or antipathy, the objection would undoubtedly be good. But does either of these dispositions or affections appear respecting either of the gentlemen whose qualification remains to be decided upon? Is there one of them who has stated to the Court, that he has a personal ill-will, prejudice, or bias? Not a particle of the answers of any of them, as I have understood them, goes towards any such a principle. Or do they say, that they, or either of them, have formed any opinion, in any degree, upon the question now before the Court? It is true that most, or all of them, have acknowledged they have formed an opinion as to *intention*; they say, that they believed he intended to commit treason. But whether he has or not, there is not one of them who will venture to say that they have received information enough to form any opinion at all. Some of the gentlemen have gone farther: one or two of them

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have said, not only that they have not formed an opinion as to his guilt, but that they cannot even say, or form their minds to believe that he was guilty of the Overt act of war. Now what is the course of argument which gentlemen take on these candid admissions? Why that this crime is made up of different ingredients: that the *intention* is necessary, and that the *act* is necessary to form the crime; and, that their having formed an opinion upon part, is as much a disqualification in a degree as though they had upon the whole. What do the jurors say? They say, that Aaron Burr had formed a treasonable intention. Now can any man believe that he had no connection with those individuals who are said to have done the acts of Treason? May he not have formed treasonable intentions remote from the State of Virginia, and where this indictment cannot reach? Now if I understand the meaning of the jurors, it is, that they believe Aaron Burr has formed treasonable intentions at New Orleans, and elsewhere, distant from this district; but how can such an opinion disqualify them from trying upon this indictment? Was there not an examination into the case of the prisoner, before one of the Judges of this Court, in which there did appear to be evidence of "various treasonable projects revolving in the mind of the prisoner." Now upon this being proved, would any gentleman say that this Judge was not fit to try him? one of these jurors might have said as much as the Judge did upon the same evidence, but this did not disqualify the man from judging the case impartially. Sir, it ought to be known that Treasonable intention, "or Treasonable projects," and the "Overt act" of Treason, are, in their natures, extremely different. A thousand persons may be charged with the one, when not one of them is guilty of the other. The proper question to a juryman, I conceive to be, is, whether he has formed any opinion of the treason in the indictment having been committed by this man. This question will discriminate whether he is prejudiced or not. Now, the very answers which were given by these gentlemen, prove that they are fit to be on this jury: that they have read the papers; that they have read the opinion given by the Judge on this case; and, that they have examined into the difference of mere intention, and the act of Treason; and are able to judge upon that distinction. Now if the questions were upon ill will, hatred or the like, or declaration that he ought to be convicted; any person who bore such, ought, without a doubt, to be rejected; because it is my perfect opinion, that the mind ought to be as free as though the person had never heard of the case. I have confidence, however, in the gentlemen's candour, that they would declare themselves, if there lurked any such impressions in their breasts. I do not recollect any case in which a Judge has ever propounded a question to a Juror, as to his opinion of the prisoner's intention; nor do I, of any one being rejected for an

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opinion upon that point: from whence I infer, that the question ought to go as to the actual guilt of the prisoner, and that Courts have so conceived it. Such was the case, if I understand it right, with the Jury on Callender, in this Court. The question directed to be put, was, whether the Juror had formed and delivered any opinion on the crime charged in the indictment. If, however, the Court should say that a Juror having formed an opinion, or expressed himself upon the intention of the prisoner, notwithstanding he himself declares that he can sit unprejudiced and give a fair unbiassed verdict, is yet unfit to be upon the Jury, I shall submit to the decision. It is certainly proper that there should be a fair trial; and I do most ardently hope, that there will not live a man who shall *dare* to say, that this jury has passed between the prisoner and the country, with prejudiced hearts, and have given an improper verdict.

Mr. HAY. We have frequently been reminded, Sir, that the accused is constitutionally entitled to a trial by an impartial jury. Nothing is more true; it is a doctrine all will unite in acknowledging; because it is unequivocally proved by common law, common sense, and humanity: Every man brought before his country should be so tried. But, while we agree with gentlemen on this point, there is a question meets us, about which they have not thought proper to say a single word. Now as I conceive this principle has already been settled, it is a subject of some surprise to me, that they did not describe it to us before they raised such high and general objections to the qualifications of Jurors. The question is, what composes an *impartial Juryman?* I will state my impressions of it.

First. A man who entertains the common sentiment, and indulges the common feelings of the country where he resides; or, more explicitly, one who possesses the sentiments and feelings of a great majority of the people. Take from the mass of the people a man whom a great majority of them approves, and who will carry their sentiments with him; and, in my opinion, that man is an impartial juror. Who shall say that he is not? Will this Court undertake to pronounce, that the majority of the people of this State are not fit for Jurors? If I were to suppose so, I must immediately borrow Mr. Martin's expression, and say, that this indeed would be pronouncing a libel on my country. This I will not do, because this I do not believe. I think, and know, that if a majority of the people were to express an opinion on this, they would at once pronounce the ignorance of those who had so branded them. The Counsel have spoken of Newspaper publications, as tending to give wrong impressions to the people; and those impressions, they endeavour to transform into opinions, as an objection to the gentlemen composing the *venire*. That the people of this State have read newspapers, and that they have given attention to them, is indubitable: Every man has

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done so. I will venture to say, that there is not a man in Virginia, however supine his disposition, or however much engaged in business, or however remote his situation from the common haunts of society, (except, indeed, some solitary hermit, shut up in the hollow of a tree, voluntarily cut off from all human beings, and regardless of the transactions moving around him,) who have not taken up this subject, and formed some opinion upon it. But all this has been done incidentally. The majority of the people have unavoidably received impressions from what has been published; and this without the least personal ill-will to the accused; or even a knowledge of him. The newspapers have made these impressions;—some have thought that he was engaged in a scheme hostile to the honour and happiness of the country,—some supposed him to have a traitorous intent—and some might have gone so far as to suppose that he committed treason. But would it be reasonable, Sir, to pronounce that, for this inevitable cause, the great majority of the people were unfit to sit upon their solemn oath on this case? If any juror occupies any different ground from a great majority of the people; if he is actuated by any intemperance, and endeavours to make proselites against, or to evince any hatred to the accused, I will not contend that he ought to sit on the case: but I never can agree, that a man should dissent to a great majority of the people, merely because he has had the address to commit an act which, from its nature, necessarily became the theme of universal conversation. Is he, because of this, to boldly stand up, and enjoy a special privilege, and be upon better ground than any other man? But where is the impartiality of which the Law speaks? Sir, it is an impartiality as to person, and not to subject. The idea of impartiality in a popular concern, is absurd. There is not in Virginia, nor perhaps any where else, a strict impartiality on this subject; but, there are very many men, who could judge on this case most perfectly unbiassed by any principle, and who could give an honest verdict. This general impression which has pervaded our Citizens, so that many of them must believe the accused has done something wrong, ought not to, and does not disqualify them.

We all know, Sir, that this country is divided into two classes of men, who have different opinions on almost every political occurrence that takes place: but I dot pretend to believe, that they are exactly arrayed upon this subject; I know that they are not: but there is one certain truth, which is, that every man almost has taken his side on this case: The majority of the people have no enmity against the prisoner; and with all this adherence, I do really believe, that when the evidence shall be heard, every false impression will vanish like air, and nothing remain but a just idea of the transaction as it was. I think I speak the language of truth, of common sense, and of law. There have been

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some authorities quoted from Reeves and M'Nally, but I do not think they bear at all upon the question. I shall not, therefore, animadvert upon them, but rely upon my own. I thought there was a time, when this point, of the nature of questions to a Juryman in this Court, was settled. I could not, to be sure, coincide with Judge Chase in his opinion on Callender's case; for I thought there was a difference in a man forming an opinion merely, and a man forming and delivering an opinion. The question then was have you formed and delivered an opinion upon this indictment? If the questions had been put to the Jurors who were summoned to try that case, which have been in the present instance, he could not have been tried; for there was not a man in the community who had not imbibed the strongest prejudice against the books. But it was sufficient in that case, if a man was in a state of neutrality as to the author: for then he was supposed to be capable of pronouncing a right judgment.

Mr. Hay here read 2 Hawkins, ch. 43, p. 418, sec. 28, where the doctrine is held out: That if a man has declared that the party is guilty, and has merely stated it as the result of any loose impressions which he might have formed, it is no cause of challenge. Whether this, strictly speaking, was good law, he would not, however, contend for. Again: It is no good cause of challenge, Hawkins says, that a man is a Juryman on an indictment similar to one on which he has already found a verdict. Here are a number of persons concerned in one act: one of them is taken and convicted; another is afterwards taken, and arraigned; but he cannot challenge a Juror, merely for having sat in the other case. The words of the law are—that one having affection to the subject, may be challenged: but, he cannot otherwise. Now, affection includes every thing which might give a bias—So if a man has made up his mind, that the prisoner did commit treason on Blannerhasset's island, he is affected with a pre-disposition, and ought not to be a juror. Mr. Martin's observations upon his quotation of M'Nally, related wholly to postponement. Now such a thing is very far from our wishes: there has not been a hint of the kind made. Were there no other objection, I would observe, that the general excitement produced, does not admit of a postponement; and the immense expence incurred, forbids the policy of it. On the whole, I can see no occasion; because if there are impressions made on the public mind, it arises from newspaper testimony—the truth of which every honest man will test upon the trial, when every circumstance shall be seen as it is.

Mr. Wirt. It were much to be wished, indeed, that in this case, and every other, a jury could be found, which was composed of all those pure materials which Mr. Martin expressed to be necessary: that every juror should come within the bar without any prejudice whatever; and with minds as pure as the

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unfullied snow, on Diana's lap. But can it be so? Does experience justify a hope, that a jury so pure can be obtained, as not to partake of one single external spot? The case must justify our apprehensions.

With respect to the authorities produced by Mr. Martin, I will observe, that they are elementary writers: they are abstract in their principles; and very seldom, indeed, can be reduced to practice: they deal in general phrases, and general cases only. If you examine, you will find, that in the reference made the other day to Reeves, the particular point or phrase of objection is *enmity*, *familiarity*, or *connection* of any description; though no doubt, public declaration of guilt was also an admissible objection. When these books do specify, they directly point to the party accused. But they are extremely unsafe to be trusted. The doctrines contained in them, in modern practice is exploded: as will appear, by a reference to the case of Tooke, p. 9.— A juror was called of the name of Thompson; but the objection made, was not admitted; which was a particular intimacy with the prisoner of 34 years. The Chief Justice declared, in plain terms, "that is no excuse at all." Now this does not agree with the language of Reeves, who makes it an excuse even to eat at the table of the accused. Once more it may be necessary to call up Callender's case. It is important in every country, that the principles of law should be well understood, and that they should not be forever shifting upon the waves of uncertainty; but, that they should be so fixed, as that every man might know at once how to steer his conduct: that he should not travel to foreign parts, and very distant, and dark periods of time. This I humbly trust, will never be the case with our Courts of Judicature. In Callender's case, Mr. John Basset, one of the pettit jurors, challenged himself, because he had read the book, and made up his mind upon the libel it contained. He declared that it was a libel; but he was over-ruled, and admitted upon the jury notwithstanding. Here was a man about to be impannelled, comes forward with a plain objection, that he has made up his mind as to the indictment for a libel. Now if we turn to England for an understanding of the doctrine of libels, what do we find to be the nature of them? Is it merely the publication? Does not the whole decision in their Courts, turn upon the fact of libel or no libel. Here is the point upon which the eloquence of that learned bar displays itself, and not on who is the author. Then Sir, in the language of Mr. Botts, and couple with it the English doctrine of libels, was not Callender robbed of half of his defence? Yes; and more than half did this juror deprive the accused of, and yet he was sworn. Well: let us draw a comparison between these two cases, supposing a juror to possess the same latitude of expression. What might he have said? Why a Juror might have said, that "an assemblage of men on Blan-

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nerhaſſet's iſland, for ſuch purpoſe as they appeared to meet, was in my opinion high Treaſon: but, whether Mr. Burr was concerned in it or not, I will not ſay." Now, Sir, nothing would here remain to be done, but to couple Mr. Burr with the tranſaction, by proving that he was there; or, that he was engaged in the enterprize. The caſes here are exactly parallel. The great facts being fixed in the mind of the juror, all that is to be done, is to trace theſe facts until they are brought to bear upon the accuſed: and then the guilt is aſcertained. But have the Jurors gone thus far in the preſent caſe? No, they have not; but if they had upon the principles adopted by that adjudication, they would have been competent Jurors. But they fall far ſhort of that: they, Sir, merely believe that the priſoner has a treaſonable *intention*; an improper intention againſt the country: and not one of them ſays that the meeting on Blannerhaſſet's iſland was an act of Treaſon. The whole of theſe their impreſſions, (for ſome of them will not venture to call them opinions,) are drawn from newſpaper publications, what every man muſt have read; and a ſource as public, and much more ſo, than, Callender's book itſelf.

If, then, we are to be ſwayed by principle, if the law is fixed, and ſo to remain; I do preſume that the caſe of Mr. Baſſet will give a deciſion in the caſe of jurors, and put all objection to ſleep. But that caſe was much ſtronger than the preſent one can be brought to appear. Mr. Baſſet had formed his opinion upon the whole book. It would have been in vain to have introduced witneſſes: his mind was proof againſt all evidence whatever as to the book. But here the gentlemen have only ſeen a part of the teſtimony, and that their conſtruction upon it is only commenſurate with that part which they have ſeen; which impreſſion, indeed, is ſo ſlight as that they feel themſelves ſtill open to conviction upon the ſubject upon the fallacy of that being proved, or the event of a want of its ſupport. This was not the caſe with Mr. Baſſet. If the gentlemen in this caſe are to be ſtripped of half of their defence, then, becauſe any juryman had formed ſuch impreſſions as we have heard---*query*---Of how much more than half of his defence was Callender ſtripped? I obſerved, Sir, when I firſt roſe, that the kind of jurymen which Mr. Martin wanted, it was impoſſible to get in the nature of things. Neceſſity has a rule of law by which ſhe is governed; and when the neceſſity exiſts, the principle invariably follows. I ſay that there have been caſes, and there are caſes, and this is among that extraordinary claſs, wherein, according to the doctrine held forth, no jury could poſſibly be had, unleſs it dropped from heaven, or ſome other planet. Look, Sir, at the rebellions in England: thoſe heavy conteſts, fomented by pretenders to the royal authority, in the years 1715 and 1745; the univerſal publicity of which, through the magazines and newſpapers of that day, is

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indiſputable. Every man read the proceedings of theſe, and every man took his deciſive ſide. That caſe went beyond a paper war of parties. The Houſe of Hanover, and the Stewart line, ſo warmly agitated every corner of the kingdom, as to claim the attention of every man. Opinion was not all that occupied the people of thoſe days; but every man *fought* for his opinion; and fought with ſuch enthuſiaſm and valour, that the clang of arms, and the roar of cannon at the famous battle of Culloden, might be heard to the utmoſt confines of the kingdom. There the very generals were known, and every motion of the conflicting armies was a matter of univerſal notice. Nothing was tranquil within the nation, and nothing unknown. The rebels were conquered, and the principal men of them bro't to trial. They were tried by juries; and by juries that, perhaps, had been arrayed in the very battles that produced the legal adjudications. Was this a time, Sir, to expect impartial juries? Was there a man to be found who did not declare the act of hoſtility high treaſon? Not a man who did not pronounce, that whoever fought againſt king George, was guilty of high treaſon. And yet the rebels were tried, fairly tried, and hung as traitors. But this does not conform to the rule laid down by Mr. Martin; by which a man is not to be tried, in any event, unleſs there can be found a perfectly impartial jury of men who have not expreſſed an opinion. It is one of thoſe Platonic flouriſhes which might have done very well for Utopia and Arabia; but, it is nothing at all when put into practice: it is perfectly incompetent to the object, and defective in its application. Again: Look at the trial of Hardy, Tooke, and their aſſociates: look at the numerous trials in agitated Ireland: Do you believe that in that highly animated kingdom, where nothing but rebellion was heard of in every corner, and its movements diſtinctly marked by every perſon of age to obſerve, ſufficient to produce excitements in every breaſt, becauſe every individual felt his intereſt involved, as the battle of Wexford will amply teſtify, is it poſſible to conceive that men could ſtand indifferent? That opinion was locked up in the breaſt, or had never been formed. And yet there, amidſt this popular animation, we hear of a H. Rowan and others, at various periods, being tried by Jury---and by a jury of men who had inevitably formed opinions on the caſes. Is it to be expected that a cauſe which ſhakes a nation to its baſis, will leave the inhabitants unmoved? Could men be found to go into a jury-box in a ſtate of as profound apathy or diſintereſtedneſs, as though they had dropped from another planet? No, Sir, it is impoſſible to conceive that ſuch men exiſted. I think, therefore, that the principle laid down in Hawkins is clear: That if a man has not imbibed the diſqualifying principles of ill-will, hatred, malice and the like; but merely has received impreſſions from what he has unavoidably ſeen and heard in ſuch a public tranſaction, affecting the real

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circumstances of the case, he is a fit and competent witness, or a fit and competent juror; for I take both on equal grounds.

Connected with the observations which I have made, I wish to draw the case now immediately before the Court. Let us, therefore, leave the plains of Callender and Wexford, and draw near to our own thresholds: from foreign flames of war and bloodshed, let us come to our own country. We know there have been no battles fought here; and it is no reproach to us, but a cause of much pleasure, that there have not. But the man can feel very little indeed, who could read or hear the rumours which have been abroad in public view, and be yet charged with insensibility. Sir: That man who can peruse the public prints that we have seen for these 12 months past—who can read the depositions of *Wilkinson* and of *Eaton*, and possesses the common sensibilities of an human being, with adamantine indifference—I had almost said, *cannot be a man*. It is not possible, in the nature of things. I appeal to your own hearts, whether any being who has a *Soul* which *is worthy* to grace the human bosom, can say he has observed these things, and taken little or no notice of them? I appeal to your Honors, whether there is that base frigidity in the character of any man in North America! Impressions of some sort or other must be taken. As a proof of this, look at this very pannel: have they not exhibited traits of interest; and some of them, of very strong impression, in this transaction? Nay, look at the gentlemen even who are already elected, and you have heard them acknowledge, that they had their impressions. Then, Sir, I contend that whenever the impression is derived from the circumstances of the case, and not from the history of the interest the prisoner himself was imagined to have taken in those transactions, it forms no good ground of challenge. Thus I understand the English books.

To be sure, when a man is discovered, either by his own confession, or by evidence, to have declared that the prisoner is guilty, or that he will be hanged, and the like, there is good ground of challenge: we do not deny it. But the gentlemen say, that in this case, an opinion expressed by the juror before the trial, that the party should be hanged, which arises from the whole view of the *whole evidence*, or from a personal knowledge of the case at issue, would be a good juror, if I understand them. Now, Sir, let us see the operation of this doctrine. He is a good juror if he has seen the whole of the evidence, or has a personal knowledge of it, if no other possible source of light can be opened upon it; but, if it is only upon a part of the evidence, he is not. The reason urged is, that it is impossible to shake his impressions, because his mind is locked forever. But if he has taken up fleeting impressions, and partial ones, from a part of the evidence, which is all that he has seen, he is not a good ju-

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ror: And why? Becauſe he is liable to err; becauſe his mind is aſſailable by other teſtimony which might come. Again. If he knows the whole of the tranſaction, perſonally, and upon his own knowledge of it, he declares it, he is a good juror, becauſe it is impoſſible for him ever to change his opinion on what he has ſeen or heard. This doctrine may be very good, but it cannot be very applicable to this caſe how juſtſoever. Here are a number of men who have received evidence of a fact, as far as its publicity has gone; they have received that fact as far as its evidence has ſubſtantiated it; and therefore from the extreme plauſibility of it, they believe it to be true: their opinions are formed upon it, and they declare theſe opinions. But yet they are not to be eſteemed good jurors, becauſe they have not ſeen the *whole evidence*; notwithſtanding they tell you, that any counter teſtimony will have its due impreſſion upon their minds, becauſe they could believe no more than they had heard! Now, certainly, this partial knowledge of the facts can never be ſuppoſed to lock up any man's mind, or render him obſtinate on a caſe about which he has only a partial knowledge.

Whether, therefore, we go to the Engliſh books or precedents, or recur to the opinion of this Court as before expreſſed by another Judge, (Chaſe,) we contend that we have a right to the doctrine which we have ſupported.

I think, if I miſtook not the opinion of this Court—given during the preſent examination, your honor ſaid, that *ſlight impreſſions* were not objectionable. Now what elſe but ſlight impreſſions can any man have, that profeſſes to believe no farther than he has heard? And can it be ſuppoſed, as already argued, that there is a perſon to be found, who has received no impreſſions on the ſubject? I cannot conceive that any man has gone beyond the evidence of this fact which has been afforded to him, and ſurely no man of common candour would finally pronounce upon it.

Mr. WICKHAM. Sir. We all ſee with how much reluctance the gentlemen will give up to thoſe well-eſtabliſhed principles of jury-qualification which we have produced to the attention of the Court. They tell us that they are ſolicitous of a fair and impartial trial; and, in truth, their whole argument is founded upon the neceſſity and propriety of it, if I am favoured with talents to underſtand it. I will take the liberty to attempt ſome reply to the arguments of the gentleman laſt up. I heard the gentleman with much pleaſure, and felt extremely obliged to him for ſcattering over the barrenneſs of Law, ſuch a variety of flowers. His brilliant flouriſhes reminded me of a Roman epigram on a lady, who was ſo completely covered by the decorations which enveloped her, that ſhe was really the ſmalleſt part of herſelf. The gentleman's arguments were exactly the ſame; it was ſo completely enveloped in figures and graces, that the

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argument conſtituted the leaſt part of itſelf ; and, it was only a flounce here, and a furbelow there, that you could catch a glimpſe of it.

What does the gentleman ſay ? He ſays that there ought to be a fair and impartial jury ; and he ſuppoſes it to be very eaſy to get ſuch an one, notwithſtanding the ſeeming prejudices.— Not content with travelling in this country, he has tranſported us to the battle of Culloden ; where he tells us that the din of arms, and the ſounding of cannon were ſo great, as to ſtrike the extent of the kingdom. Every man knew that there were the banners of civil war unfurled. But he has compared the judicial deciſions of that day, and of that place, to the caſe now before the Court, when ſome very material points of diſtinction are diſcoverable. Every man in England then knew, that there was civil war ; and all men were acquainted with the hiſtorical facts, which originated and ſupported it. It was upon this view of the fact, that the Courts of thoſe days decided that an impartial jury could be had, and that the rebels could have a fair trial. And why ? Becauſe the facts were all known to the jurors, according to the rules of law, and they could decide upon them with integrity. It was the opinion of the Court, that every man knew that there had been a rebellion ; and that the circumſtance was apparent, that the moſt prominent and active characters were known. There was no ſuch thing as an indifferent man to that tranſaction, and impreſſions could not be taken up from mere rumour. And if a man could have been found who knew nothing of it, or had not thought about it, he would have undoubtedly been paſſed by, as inſufficient. But let us draw nearer to the circumſtance now before the Court—Leave the ſhores of Britain, and its blood-ſtained fields of open rebellion, to reflect whether there be any analogy to be drawn from the quotation : And here we ſhall diſcover a wide diſtinction. Had there been an army of ten, twenty or 30000 men, artillery, infantry and cavalry raiſed, and a number of gun-boats equipped, deſcending the Ohio with intimidating aſpect, and Col. Burr had commanded the whole armament, and engaged with every thing that oppoſed its progreſs : And Mr. Burr had been brought here a priſoner, taken from his fruitleſs attempt to complete his object, which object was well known : or could hiſtorical facts point out a ground for his pretenſions, there could be no doubt about the partiality of a jury who ſhould be called to ſit on his caſe. Theſe circumſtances would have left an indellible impreſſion on the mind of every man that he was a traitor : but the facts and not the prepoſſeſſions would have pronounced a deciſion. But how are the facts now charged to him proved ? Why the Preſident has ſaid, that " of his guilt there can be no doubt ;" and by his office he is entitled to the higheſt confidence. I join the gentleman in acknowledging my reſpect for that high officer.

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and I will venture to believe, that he did believe Col. Burr to be guilty of all that he was charged with. But that does not create in us a neceſſity to take his word, when all his impreſſions were taken from others, and not from his own knowledge of facts: He is but a man, and liable to miſtakes. But Gen. Wilkinſon has ſaid it, and he muſt be acquainted with it. Be it ſo: but he is only a witneſs, and we are not obliged to take his word. Perhaps the credibility of that witneſs may, hereafter, be queſtioned and ſcrutinized. But did even he ſay in his affidavit that Mr. Burr was guilty of Treaſon? The Supreme Court, in their examination into the caſe, have already decided, that his teſtimony does not amount to the charge of treaſon. The whole then refers to the depoſition of Mr. Eaton; which, in itſelf is *ex-parte*, and differs materially from any thing ſaid by any other individual witneſs. I will freely admit, however, that notwithſtanding his tale is ſo marvellous, it may, notwithſtanding, be true. But what does that depoſition, ſtrange as it is, expreſs? Why, at moſt, that there was a treaſonable deſign at the commencement of a tranſaction, that has never been carried into effect. But what do theſe jurors ſay? Why upon this depoſition of Wilkinſon's, which does not point to any Treaſon, and this extraordinary and unſupported Tale of Eaton's, that they have formed their opinions as to the treaſonable deſign; that he has carried that deſign forward, and never had abandoned it until after he quitted the diſtrict of Virginia, and found his ſcheme impracticable: So that this enormous maſs, this unanſwerable flaſh of evidence, which ſtruck ſuch ſtrong conviction to the minds of thoſe jurors, is reduced to this ſigle evidence, this wondeful tale, which muſt end in vapour. I truſt, therefore, that the gentleman will admit that his compariſon of this tranſaction with that of the rebellion in England can by no means be made parallel. An enemy in one inſtance ſpreading terror, ſword and devaſtation through a country like England, with a numerous population; a tranſaction which no perſon could ſhut his eyes againſt—they were under the neceſſity of knowing it—And in this inſtance, at moſt, a diſtant intention to execute what! What the hiſtorian's page will ſcarcely be able to deſcribe, for want of materials to furniſh any thing like a ſketch. For what hiſtorian, from his whole and full view of the circumſtances, can calmly ſit down and ſay that there was a determination of treaſon? The Preſident's letter to Congreſs does not even charge Mr. Burr with retaining this treaſonable deſign throughout. Will the jury then aſcribe to him this continuance of intention?

I ſhall now come, May it pleaſe your Honours, to conſider this caſe as it ought to be weighed—like any other caſe that is litigated in a Court of Juſtice. I cannot conceive that the gentlemen themſelves have met this queſtion fairly, and faith-

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fully analized the traits which present themselves, or they certainly must have been convinced that none of these men are competent jurors. If one single juror might be sworn, having this opinion of Col. Burr's treasonable intentions, so might twelve. Now Sir, what would be our situation if twelve men were to be impannelled on this trial, and every one of them had previously unequivocally declared that he believed the prisoner to be guilty of the intention to commit treason? Now, a crime consists but of two parts; the Intention and the Act. Here is a variety of testimony brought forward to prove both the points: I ask, with what attitude could I stand before this Jury, to attempt at proving his innocence? They had already declared his guilt upon the intention; what course could I possibly take, although my mind was perfectly satisfied of his innocence, to endeavour to make the jury believe so? Would I waste my time in vain attempts to operate upon marble? I should know already, that the jury were composed of such impenetrable stuff, that there would remain no chance whatever of my feeble efforts being operative. The inevitable consequence would be, that Col. Burr would be convicted unheard, and fall a sacrifice to opinions formed without evidence or argument in his favour! A man must indeed be predispposed who could have formed his opinion from such testimony; and his qualification must consequently be vitiated, as to every essential part. Now, I would ask, if this state of the mind in a juror would not have a direct operation upon the great question—Whether the act was perpetrated or not? Here is contradictory testimony produced; witnesses who depose that there has, and witnesses who depose that there has not, a certain event transpired. The relative testimony is thrown into the scales: would it not, from the former impressions of the mind, be probable, that they would rather turn towards the proof of the overt act? Looking to the intention, would it not be strongly inferred that from that intention, already ascertained, there was a greater probability of the guilt? Yes, they would rather believe two who swore that a certain thing did transpire, than three who swear that it did not: for the act being rendered probable, by the intention, slighter testimony in order to support that act, would be received in the mind, and the greatest probable tendency would be, to convict the accused. I assume it as a fact, then, that bears very strongly upon every part of this case; and no juryman can be said to be impartial in any part of it, who has formed his mind upon the intention.

Let us suppose that six jurymen are impannelled upon the cause, and each of them had declared his impressions that he was guilty of the criminal intent; but, at the same moment, knew nothing as to the act. Six more are called to the book: These were satisfied as to the act. The counsel had all agreed that the act was committed, and therefore their opinions were not to be a disqualification. In what situation, I pray, Sir, are the counsel

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left? How can we addreſs this jury? If we addreſs them on the intention, we *fail*; becauſe one half of them have declared themſelves upon that point, and are as adamant; and, if we addreſs them on the fact, we find the other half equally decided upon that. We cannot hope to move them from the ground they have taken, and ſo we fail in our defence. And can theſe be called impartial jurymen by any man of common underſtanding? But, Sir, Mr. Martin made ſome remarks, and very correct ones indeed they were, that he did not underſtand this buſineſs of dividing by halves, in order to eſcape the epithet of prejudice in a jury. A very familiar inſtance might be put. In England, the univerſality of one ſpecies of offence, conſtitutes Treaſon; ſuch as pulling down all bawdy-houſes, demoliſhing all meeting-houſes, &c.---or, however, that becoming the general object. Now, Sir, ſuppoſe a man was there to be impannelled on a jury to try a ſuppoſed criminal of that deſcription. The crime is known to the whole city of London, and every man had deprecated it. This jury ſays, "I have no doubt but this man had a treaſonable intent; but, I do not know particularly whether that houſe was pulled down, or not, with which he is charged." Now could the caſe be doubtful, whether or not that juror would find the culprit guilty? No, Sir, the intention is the principal thing; and, when that is once aſcertained, facts will prove as to the act. Mr. M'Rae ſays, that the ſtandard is, whether the jury have a perſonal prejudice againſt the priſoner or not: not a belief as to his intentions, but a perſonal prejudice. Then, I ſuppoſe, Sir, as prejudice againſt the perſon conſtitutes the greateſt criterion of qualification, it matters not what the opinion is. Now what are our prejudices againſt a perſon (if they be not formed from envy, hatred, ill-will, &c.) but our having taken up ſomething about that perſon's conduct? Every mind, well conſtituted, thinks of a man according to its impreſſions of that man's actions. Thus, if the man's conduct is ſuppoſed to be generally bad, or if one particular act be aſcribed to him, the prejudice might follow. And here, the prejudice might be of a long ſtanding, or it might have been recently taken up. Now, do we not find moſt, if not all of them, jurors of this deſcription? But, ſays Mr. M'Rae, has either of theſe gentlemen ſaid that Mr. Burr was guilty of Treaſon with Blannerhaſſet at his Iſland? What, Sir, continues he, have we to do with Mr. Blannerhaſſet? His trial has not yet come on, and we know nothing about it; nor can the court prove any thing about it. Some of the gentlemen ſay, he intended to take New-Orleans; but, there is nothing about New-Orleans in the indictment. Sir, if the gentlemen had looked at their own indictment (which it really ſeems to me they have not done, by their manner of proceeding) they would have found, that it is ſtated to have been the intention of Mr. Burr to have deſcended the river for the purpoſe of taking *New-*

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Orleans, as a preparation for his aſcribed ſcheme of poſſeſſing himſelf of Mexico. But, ſays he, every man muſt have this opinion: the judges of the ſupreme court had it. Sir, it was not ſo. Their idea was, that there were treaſonable ideas floating in the mind of Col. Burr, if Mr. Eaton's depoſition was fact; but, that he only ſpoke of projects which were never completed.

The caſe of Callender is conſidered and relied upon as one in point. The Court there did determine that John Baſſet was a proper juror, although he had pronounced upon the law of the caſe. But, Sir, what did Mr. Baſſet ſay? Why that the book was a libel; but, did he ſay that Callender wrote it? Did he ſpeak of the *intention* of Callender? No, he did not ſay either. Did even one of his Counſel pretend to deny that the book was a libel. Did they not rather ſtep forward with the ſole object of diſputing the conſtitutionality of the ſedition law, as it was called; and of the Court, under which he was arraigned? Now ſuppoſe one of theſe jurors had ſpoken of the law of treaſon, would that diſqualify him? No, Sir. But the caſes are different: That was a caſe within the knowledge of every man, and every man had formed the ſame opinion. But the gentleman bows to authority. And what is that authority?—it is, that of Judge Chaſe's opinion. Now what was the fact? Why, that Judge Chaſe was impeached for this very deciſion before the Senate, and the votes given on the queſtion were 18 to 16; which, though an actual majority, was not a conſtitutional majority of the Senate. Now, with all this view, a gentleman will come forward and plead an opinion, when it was even ſaid, that that opinion was not law. [Mr. W. here read the charge exhibited by the Senate againſt Judge Chaſe on the point.] And we know not but every gentleman might have thought the opinion erroneous; but, coupled as it was with other things, the article of impeachment was oppoſed by the majority. With reſpect to the gentleman who held that high office of Judge, I too muſt have my opinion: I then thought, and I now think that it was law, becauſe it was a deciſion upon an abſtract queſtion.

But here is a declaration made by theſe jurors that tends inevitably to put this matter at reſt; for they all ſay, that they are perfectly ſatisfied they can give a fair verdict. There is no doubt, Sir, but they think ſo, becauſe *they* think that they are not prejudiced; but this confidence of theirs is predicated on an erroneous opinion; for it is a juſt maxim, that no man is prejudiced in his own conceit. Every man on earth, I have no doubt, would ſay the ſame, from what he imagines to be the purity of his own motives and actions. But, Sir, if a man will go forward and ſay, that he thinks he can conquer prejudice, I will not ſay that he is a bad man; but, I will boldly declare, that he knows nothing of his own heart. It is known to all, that men are ſubject to prejudice; and, therefore, I contend,

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that a man in whom prejudice is so apparent as it is in these jurors, ought to be excluded from sitting to judge upon the life of a man.

It was a matter of no small surprize to me, I must declare, to hear what definition Mr. Hay gave to Mr. Martin of what *an impartial juror* meant. He certainly gave a definition which never would have struck either Mr. M. or myself. What was it ?— Why, that the sentiments of the country, or a majority of them was to be the governing principle; and, if there could be discovered a common sentiment, that was a proof of the impartiality of it; and there need be no fear of the misuse of it, of course. Let us see the effect of this doctrine. Instead of turning over and over your musty old folios and black-letter law-books, and pouring away our time in pursuit of what used to be the practice of Courts, and the test of right and wrong, we need only go to barbacues, horse-races, and other places of public amusement, where our fellow-citizens assemble for their diversions, to hear the *common sentiment*: and then come into Court, and return a verdict upon the common sentiment. Now, Sir, my habits may lead me into companies of a different description of men, perhaps, to what Mr. Hay might be led into: I might discover one common sentiment, and he might discover another; and, how are we to reconcile these variations. It might, therefore, be as different to get a verdict in this way as any other; except we could fortunately agree to go one road, to ascertain the public opinion. But, Sir, my opinion is not so; nor, I am happy to say, is it the opinion of Mr. Wirt; who has given another, and a better rule; and which compleatly answers the arguments of Mr. Hay, on this project of his. Mr. Wirt asked, whether we were to be governed by principles of Law, or whether we were to be floating upon the ocean of uncertainty ? Now whilst Mr. Hay would keep us perpetually floating on the Sea of liberty, and the uncertainty of popular sentiment, his assistant-counsel would fix us somewhere; but the spot, to be sure, he and myself cannot agree upon. Well, I must keep to the position, that an impartial juror is one that partakes of the common sentiment of the country. Now, Sir, in order to know whether a jury is impartial or not, I must take the declaration of the juryman. But let me go to my Law-books, and study over the wisdom of the bench, notwithstanding it might cause me some more labour; and let Mr. Hay omit this laborious task, and go abroad to enquire what the public opinion is. On many occasions, my worthy friend thinks that I misunderstand him; when, (he will pardon me if I say,) I fear he often misunderstands himself. In this, however, he spoke too plainly to be misunderstood. And are we to do as they at a certain late period did in France: institute the *appele nominal*, in order to discover the common sentiment, when they propounded the ques-

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tion to the French people, "Are you for Napoleon being King of the French?" Or, by what other means would the gentleman aſcertain what the public will was? Very probably I have not got ſo much information of public opinion as he has; but, I muſt be allowed to think that he has not rightly rated it.

But where does this public opinion come from, vitiated as it is? He ſays it is Mr. Burr's own fault. What has he done, Sir? He has borne public indignity and reproach, (and much of it to his face) with a firmneſs, patience, and dignity, which, I may venture to ſay, is almoſt unparalleled: a rare example indeed, which ſcarcely a man in the community could be found to follow. But I will not go ſo far in my preſumptions as the proſecution: I will not ſay that it is the fault of any body; I know it is not the fault of Col. Burr. Nor will I ſay it is the fault of the gentleman. But when one circumſtance is recollected, we cannot but blame thoſe gentlemen for ſome degree of inflamation which might have been conveyed to the public. Have we not heard that gentleman often declare that "*he had not the ſhadow of a doubt*, but he ſhould well ſubſtantiate the guilt of the accuſed?" Then, Sir, might not this language have ſtrongly impreſſed the public mind, that the public officer, who knew the evidence, was right? Sir, this may prove the fallacy of truſting to public opinion from its fluctuating ſtate; for, if we are to take that as our rule of law, or as the government of deciſion in our courts—what would have been law under a former adminiſtration would not be ſo now; and what is law now, might not be ſo at ſome future period.

But Mr. Hay agrees, that if theſe jurymen had attempted to make proſelites, it would have been a ground of challenge. Now, Sir, have not ſeveral of them ſaid, that they expreſs their opinions with this view? And there is no doubt of it: they are the friends of the adminiſtration; and there can be no doubt, but they were deſirous that others ſhould be ſo alſo. It was natural. But this argument proves rather too much for the gentleman; and, therefore, amounts to nothing. Why, Sir, the doctrine amounts to this: that if every one of theſe jurors had declared the accuſed to be guilty of the intention, and of the act of Treaſon, becauſe it was the public impreſſion, therefore they would be proper jurors. The voice of the country was ſo. Perhaps however, the gentleman will ſay, that the public opinion does not go quite ſo far as this. But I will anſwer, that he has not ſet bounds to the public opinion; and, he does not know how far it will go. Indeed, is is impoſſible to ſet bounds to it; becauſe, if you allow its own length, and ſet it agoing, when it once has the reins, it will ſoon drive you off the ſaddle. Of this, ample examples have been exhibited to our view. But however, in order to ſoothe thoſe who fall in the minority, the gentleman very condeſcendingly comforts us by ſaying, that the

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country is divided into two classes; some on one side, and some on the other. Now suppose he is not quite so correct as he supposes, about the universality of the public opinion on his side, or agreeable to his wishes—(I mean the majority.) Does he mean the public opinion in Virginia, or in the United States? Now we know that there was a majority in the U. S. but we do not know that there is now. The public opinion is liable to change.

Hawkins's pleas of the crown was cited, to prove that a man may be a fit juryman, though he knows the fact. But, Sir, has any one of these jurymen come forward and said that he knew the whole of the facts? They have all declared their impressions, at least; and impressions are but a small step from opinions, that Mr. Burr is guilty of the intention to commit treason. The least of it that can be said is, that their knowledge or opinions have no application to the case; because it is only fact so far as they have heard it, according to their belief. And this is enough.

But they believe that it is not practicable, or even possible to obtain an impartial jury. Why, Sir, where is even the improbability of it? Have we not got four already out of this venire? No doubt we can find yet remaining in the community at large, eight honest men, who have not committed themselves on a case, which they have only heard one side of. I entertain the strongest presumption of the certainty of it.

It was observed by Mr. Wirt, that all the authorities which we had produced were elementary, and merited little or no regard upon that account. But I answer, that though some are not to be regarded, yet it is not the case with all of them. The highly respected, and to be revered names of Hale, Hawkins, Cooke, and others of that description, surely merit our attention. But then he lays his hand on a book, which relates the case of one of a *venire* having been intimate with a prisoner so many years. I mean Horn Tooke's case. I will not say that the gentleman wilfully misrepresented; but, will say, that he did not convey a just view of the case to the court, as a reference to the trial will plainly shew. What was the case? A juryman was called: a gentleman present, said he was absent. There was no objection at all made in this case: He kept away, because he did not choose to come and sit upon the jury, when his friend was on trial. It was mentioned that an intimacy had subsisted between the parties;—but what did Justice Eyre say?—— "That is no excuse." No excuse for what? For not appearing in court. He did not mean that it was no excuse from serving on the jury; for, on that, he was not called to give an opinion.

Mr. *Wirt* rose and contended, that in candour it ought to be understood as he had represented it; which was, that his terms of intimacy with the prisoner was no excuse for his not sitting on the jury. He read the passage at length, and insisted on the premises.

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The COURT conceived that the case had no application at all to the present case.

Mr. WICKHAM continued. He believed, that his memory must have very greatly deceived him, indeed, if he had not heard very many objections made to jurors on account of friendship, even in civil cases. He begged the gentlemen to understand that he came there to try the fact and the law of the present case; and, upon that ground alone, he must stand or fall. But, if he must try him upon popular opinion—the life of his client, he should most seriously fear, amidst the agitation which had been fermented, would be like a feather in the scale; for, upon that, no dependance could be placed: and the trial by a prejudiced jury, would be nothing but a serious mockery. This was the view which that sagacious body, the framers of the Constitution, had. They did not choose to confide in popular prejudices. Was it not known to them, who had the volume of human nature lying wide open to their view, and the history of mankind in all ages and countries to draw wisdom from, that the time would arrive, (how soon they knew not) when some individual would be, or might be marked out as an object of popular fury, and political jealousy? They, therefore, wisely provided, that every man should be tried by an impartial jury: which privilege was farther secured by the amendments to that inviolable instrument, which exalted the crime of treason above the power of the Legislature, and transmitted to the citizen his rights; that not the changeable expression of public opinion should hold his existence, but this sacred instrument itself fortify him against all incroachment.

Mr. RANDOLPH, (at the request of the Court) read the reply of Judge Chase to the article of impeachment which relates to his decision in Callender's case, p. 19, appendix to Chase's trial. He had not intended to have interfered in this debate, nor should he do it now, were it not for the importance it appeared to assume; and that now a great æra was to be formed, on the very important privilege of trial by jury. When objections were made to individuals, for comparatively small disqualifications, it then demanded not my attention: but now a serious blow at this inestimable gem is attempted, who can be silent? Sir, whether chance or Heaven has given us this illustrious boon, I will not undertake to say; but, I will say, that it has been justly pronounced to be the great palladium of our liberties, and is well worthy of our punctilious attention to preserve it unsullied. Let us keep it in proper bounds, and it will be our inevitable preserver against every innovation and persecution: It will afford us pure and unpolluted justice, and bid us defy every malevolence. Sir, how could you, how would you, sit there, and see a man brought in guilty of a capital offence, by men whose hearts are defiled by partiality? Away with all Courts and Judges too, if

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we are to be adrift upon such uncertainty as must be the consequence of doctrines which we have heard. Tell me not that I am safe in my own habitation, if doctrines like these are to be calmly yielded to by the bench. It is a solemn mockery upon our privileges; and, we are all deceived, if we think them unalienable. But, leaving that extraordinary innovation in principle, let us see what would be the consequence of taking such men as have been presented to us. We are to have, by our Constitution, impartial, indifferent men for jurors. But here a man may have his mind made up on two or three points, and a fragment of his mind may yet be left unbiassed: he is to be called an impartial juror! Now I will calmly ask any reflecting man, whether such an one is adequate to the administration of Justice in a cause like this? Some analogies have been stated: murder and burglary have been quoted, and the principles of law respecting them have been applied to this case; forgery, or the uttering of false money, knowing it to be false, might be added to the catalogue of crimes. A juror has nothing to do in such a case, according to the doctrine we have heard, but to determine in his own mind that the prisoner was guilty of the charge of knowing the money to be false, and then the imparting of it would follow of course as a necessary consequence. Give him a cobweb, and he could make a table of proof of it. From what principle could it be gathered, that such men are competent Jurors? Reference has been made by Mr. Hay to Hawkins, ch. 43, sect. 28. To be sure, the gentleman expressed a doubt, whether it was law in England or not.

Mr. HAY. I doubted whether it was law in this country or not.

Mr. RANDOLPH. Yes, sir, but what does the gentleman refer us to, when he is speaking of the doctrine of challenges, and the cases? To the year-books of Harry the 6th, and to other periods of the Tudors, when no such thing as a spark of liberty was even heard of, and the rights of the crown were the main rule of the courts. This very Hawkins, upon whose *bloody* doctrine confidence is now placed, has confuted himself in numerous instances. But what have we to do with their year-books? What with their State tricks, or what with their State policy, except it be to avoid their absurdities? Shall we subscribe to their imperious declarations? I trust not, sir: I trust that we shall see men on our juries, who are open in mind, to decide from their *knowledge* of the case, according to evidence. But here we differ perhaps; for, what we call evidence in the period of time when it ought to be delivered, seems to be assumed by them as sufficient, if out of court; so that if a man had formed his opinion before he came here, from such evidence as he had seen, good or bad, it was no disqualification. This is not the justification of an impartial juror; for a man ought to presume nothing, but

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wait for the truth; upon which he is to decide, upon a moſt critical examination, and from an unerring ſource: nothing leſs than evidence of facts to be delivered in open court. Sir, no man has a right to make up his opinion out of court. Have I not heard this repeatedly delivered during the preſent term by this honorable bench? I refer the gentleman to the 27th ſect. of the ſame chapter and book as that which he quoted, to convince him how far he is wrong. Is it not all-important what the *intention* of the party was? It is the moſt material point, by acknowledgment. No man, therefore, who has made up his mind as to the intentions of the accuſed, ought to be put upon the jury: and for that ſole reaſon, if no other exiſted. Mr. Wickham has explained, as has Mr. Martin alſo, about parts of teſtimony. Now we know, what are often the component parts of juries. Suppoſe one man to have made up his mind on one point, another on another, and a third on another; it is common for them to give way, one his point in part, and another his point, until at length they form a ſufficient coincidence to make up a verdict. But the very nature of theſe ſubmiſſions, proves the abſurdity of putting men on the jury who have prepared themſelves with any tinge of a verdict.

Is it ſaid in the book, that friendſhip and cloſe intimacy is a ſufficient ground to exclude jurors? It is not ſo in reſpect to witneſſes, but it is ſo with jurors. Some of the books even ſay, that if it could be proved, that the man who ſhould be called afterwards to ſit on a jury over a man with whom he had not been upon terms of intimacy but merely entertained him at his table, he is not qualified to be an impartial juror. This principle I know is denied; but whatever conſtruction gentlemen pleaſe to put on the caſe of Tooke, where Mr. Thompſon, an intimate for 34 years, was rejected, avails to me nothing; for the language of the caſe plainly imports, that intimacy was the ground of objection. Sir, I hope that this being the firſt time that the bleſſings of a jury-trial of ſuch conſequence has preſented itſelf to this court, you will take more than uſual pains to enſure to the accuſed the advantages of an impartial jury, agreeable to the demands of our Conſtitution and laws. Sir, when I look at human nature, when I read the human heart—open there, myſteries and ſtratagems ſcarcely to be believed—(a volume more than commenſurate with our united thoughts), I ſee cauſe to be watchful and earneſt in the cauſe of juſtice. I would even appeal, from theſe reflections, to Mr. Hay's great tribunal itſelf. I would appeal to the whole world, and aſk, if it be poſſible for a man to come impartial, faithful and true, in a caſe where one half of his mind is made up to give a verdict, before he ever was ſummoned to the court?

CHIEF JUSTICE. The queſtion is, what will diſqualify a juror, when he is called before this Court to be ſworn. This is

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important; but, however important, we have for our government, decisions already made by the Law. The Jury is sworn to decide according to the testimony which may be presented. This designation is made by the common Law, and, I presume, that the provisions which are made in our Constitution and Laws to protect the rights of every man, are made that this common law should not be infracted; and a jury should be collected with fairness; and, that none should sit to judge a case, but men who are perfectly impartial. Hence it is provided, that the most distant connection of one of the parties, cannot be a juror. It is not because they are connections merely, that they are excluded; for this, of itself, could be no reason; but the law supposes that such an one cannot decide as impartially, and bring in as fair a verdict, as one who did not bear such a relation. It is presumed that, from the connection between him and the party, his mind will not be so *free* as to enable him to receive, and judge of the weight of the testimony so correctly, as he ought. And the law will, in no item, endanger an unfair verdict: therefore, it has formed these *positive* exceptions: not, as I observed, for the sake of excepting, but to avoid all probable injurious results. Now it may be, that there are connections which nothing is to be apprehended from. They may be very distant indeed: They may have no knowledge of, or feeling for the party: No acquaintance: never have seen him. Such a man may say, upon his oath, that he should be able to judge impartially: and there might be the greatest probability that he would: and yet the exemption is positive: because the law supposes that the verdict *might* be unfair: that is—that the influence is such. Probably the Judge rendering such an opinion, would not have the least doubt of the impartiality of such a man: but yet the law will not permit him to lean to such a case; for the law is so extremely jealous in Jury-trials, that it will grant no privileges to a Court to decide, beyond where it affords the power.

Now, it would be strange indeed, that, where the Law has been so extremely watchful as that not the most distant connection shall sit upon a Jury, lest there should a germ of prejudice or influence lurk in the mind of such an one, it should be perfectly regardless of a person who has absolutely formed an opinion. It would seem as though it was overguarded in one case, and as deficient in the other. The Law in the one case is very watchful, lest there should be any unfair bias; while in another, it would seem as though it was regardless where there was a manifest, and even declared predetermination. Thus it would seem to mind trifles, and yet pass over the most important circumstances.

The object of the Law, is to secure a fair trial; and hence it is, that certain connections are made to disqualify. It suppo-

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ſes an apparent bias might unite with thoſe connections. Now if there are other circumſtances which prove a bias, ſurely thoſe circumſtances are as ſtrong as the other. It is undeniable, that this acknowledged biaſſed ſtate of the mind, ought to be regarded.

It has been ſaid, that perhaps an abſolute ſtate of indifference—a poſitive, perfect and total indifference—can hardly exiſt. This is probable, extremely probable. But there are certain caſes that ariſe out of the neceſſity of things, which require the law to bend to them. It is certainly deſirable, that the perſon who ſits as a juror, ſhould not feel on his mind the leaſt poſſible impreſſion. When that is the cauſe, the evidence will be the governing principle, and the law is not required to bend to the caſe, perhaps at all. But it would be abſurd to ſuppoſe, that a juror can be admitted beyond the abſolute neceſſity of the caſe: If he might, the admiſſion might be extended to any ſtate of the mind; and, therefore, the neceſſity of any deviation whatever, from the ſtrict dictates of the law, muſt be made to appear, otherwiſe the juror muſt be rejected. The rebellions in England and in Ireland, which have been referred to, are ſuch caſes. Now had not the law in thoſe caſes bent to the particular circumſtances of the caſe, it would have been impoſſible to have found a Jury. There was no man who could not eaſily decide, that the pretender was guilty of Treaſon. The neceſſity of the caſe, then, went to the full extent of receiving ſuch a jury. But if it ſhould fall ſhort of ſuch a caſe; if it be doubtful whether treaſon has been committed or not, (the act being neither ſo public nor ſo violent,) it muſt make a conſiderable difference. This diſtinction is governed by the nature of the offence charged. The alternative in a caſe of ſuch public notoriety, as that every man *muſt* have made up his mind, there muſt be no trial at all, or to try the caſes by a prejudiced jury. This was an extreme caſe, however. When the facts have not received that high tinge of public notoriety, as that all mankind muſt have received a certain conviction, we muſt recur to the general principles of Law, and fit it as near as poſſible to the caſe. This general principle of Law is, that a Juror, whoſe mind is prepared to go upon the caſe to receive his convictions of the guilt or innocence of the accuſed from the teſtimony, and that only, is the only proper perſon to be called an *impartial* juror. But a different character, the law cannot truſt. It apprehends danger from the reſult; and, therefore declares him not to be fit to ſtand between the accuſed and the country. This is the general view which Courts have had, with reſpect to qualification—that, where a man has formed and expreſſed an opinion upon the caſe itſelf, upon a view of the whole caſe, he is not eſteemed an impartial juror. But where a man has formed an opinion upon only part of a caſe, from teſtimony ſuch as he has

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ſeen or heard; or where the impreſſion made is extremely ſlight, it merits a different treatment. The Court has not ſaid, nor will it ſay, that ſlight impreſſions ſhould diſqualify. Thoſe different degrees of impreſſions: ſome may be very ſlight. Thoſe, for inſtance, who try the caſe according to the ſtatement of the tranſaction made in Court, and not upon any ſtatement made before the trial, muſt be denominated proper for jurors, becauſe they poſſeſs no influence; but if the mind is ſo prediſpoſed, and the impreſſions being made ſo ſtrong, that the man is prepared to combat all teſtimony, and even truth itſelf—to liſten to one ſide with the greateſt eagerneſs, and as powerfully reſiſt what might be advanced on the other ſide—this is calculated to cloſe the mind upon the teſtimony; and, there is no means of receiving thoſe impreſſions which ought to be made.

The caſes of murder and counterfeiting of coin, are all very ſtrong caſes. Suppoſe a man to be arraigned for murder. A juror ſays, "I do not know that this man is guilty of the murder; I have no evidence of it; and, I am ready to hear it. If the perſon was killed, I am not ſure it was done by this individual; but one thing I am certain of—that this priſoner had malice propenſe in his heart againſt that man at the time he was killed, becauſe I know that he determined upon his death. This is all the opinion I have made up." Now would this man be a proper juror? Certainly not. So, with reſpect to counterfeiting money. A juror might ſay, that he did not know that individual to have paſſed the money, but he knew him to have counterfeited it. Now, the charge was for counterfeiting and paſſing; and the juror having his opinion made up on one part, renders him incompetent to receive evidence impartially on the other. The ſame principle is applicable in a caſe of Burglary.

Then it depends upon the nature and ſtrength of the opinion formed; it depends upon the queſtion, whether it be formed conſcientiouſly upon a knowledge of the facts; or, whether it be ſo ſlight, as to be regardleſs. Or again: whether it be upon a material, or an immaterial point. Upon theſe points, it muſt be judged, whether ſuch a juror could decide upon the caſe fairly or not. It cannot be preſumed, that a man of honour, integrity and prudence, would decide unjuſtly; but he may look at the caſe in a different way from what a man might, who had known but little of the ſituation and circumſtances of the accuſed. Hence there ariſes a difference in men, who are in all other circumſtances alike, in reſpect to their impartial and ſound judgment. It certainly is highly deſirable, that the greateſt impartiality ſhould attend this caſe.

With reſpect to the particular circumſtances of *intention*, the Court have thought much. When a juror has only declared himſelf in general terms; or that, at ſome one period, he has entertained impreſſions improper to a deciſion on the caſe of the

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accuſed; and, where he has manifeſted that impreſſion in the way only that moſt men have done, the Court ſuppoſed that the objection was ſlight; and, therefore, to be conſidered too trifling to be a ſource of challenge to a juror. Or even a man might have maintained that impreſſion, and yet, becauſe it has been the only ſource of evidence from which he could form any ideas, he has withheld from expreſſing himſelf. This caſe differs very materially from the caſe of a man who has avowed his opinion, and that *up to the very time* expreſſed in the indictment of the priſoner at the bar, that he has been machinating crimes againſt the U. S. and thoſe offences perhaps, which are ſpecified in the indictment. It muſt appear that his judgment is formed upon the facts: which is too eſſential a point to admit of being impartial: becauſe this opinion is not formed upon the impartial point of *teſtimony*, in ſuch a way as the man ought to decide; and in ſuch a way, as the Court muſt require of an *impartial* juror. From which character, the Court ſay, that no Juror ought to ſerve.

In the courſe of this morning, my mind has been very ſtrongly impreſſed, indeed, by the different appearances which this caſe might aſſume, and of the reverſe. Now I will ſuppoſe that a gentleman has formed an opinion that the priſoner was not guilty of the *intention* of committing treaſon againſt the U. S. or, that he had not committed treaſon. The pannel was made up, ſay, of perſons who had every one made up and declared ſo, upon the teſtimony which they had ſeen. They were ſtrongly impreſſed, before hand, that the teſtimony did not furniſh ground to prove any intention of committing treaſon. But however, there being other facts that probably would come out, to prove to their ſatisfaction, that he did commit treaſon, thoſe facts may furniſh a ground to pronounce him guilty, if they ſhould be competently proved, but that ſo far as they had ſeen, he was not guilty of any intention to commit treaſon, or in fact, that he had not committed it. Suppoſe they had advocated this opinion, with much warmth, repeatedly and very publicly.—Would ſuch perſons be thought proper for Jurors? I am ſure they would not. The ſubject, then, is equally ſtrong, in whatever light we view it: whether a man has formed any opinion favourably or unfavourably; and it does ſeem, that the perſons who have carried it ſo far, on either ſide, are incompetent.

With reſpect to the authorities cited, I have a doubt of the application of ſome of them. Upon the impartiality neceſſary in a juror, there can be no doubt. I ſhould not think that a perſon who had declared the guilt of another, upon his own knowledge of the caſe, was a competent juror; but if we admit it to be law, it is not applicable here. Why is it that a juror who has ſerved on a firſt trial and rendered a verdict, if there ſhould be a new trial granted, cannot ſerve on the ſecond trial?

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It cannot be he has any prejudice in the case, it is because he has already given a verdict, that he is excluded: this is like a man delivering an opinion upon a knowledge of the facts. It did not appear to be so with Mr. Bassett in Callender's case. This was, to be sure, the declaration of an opinion formed to the very extent. He had read the book; and, having read it, he must be supposed to have formed an opinion upon it. Now, I understand that the general question which was asked by the Court, was—"Have you formed an opinion, and uttered it relative to this indictment?" If the question had been, whether the prisoner had published a seditious libel against the government of the U. States, the juror could not have been received, if he believed affirmatively. Now here is one of these jurors, who has said, that if the public rumour was true, the prisoner was guilty. Now the Court thought this man a good juror, because he had left his mind open to conviction. But when it shall appear, that a juror thinks that the prisoner possessed treasonable designs *up to the time charged in the indictment*, the Court is of opinion that such a juror ought to be set aside.

The Judge having finished his opinion, the jurors upon whom the Court suspended an opinion yesterday, were then called.

John H. Upshaw acknowledged, that he believed the prisoner was pursuing his treasonable designs up to the time charged in the indictment.

Chief Justice. Mr. Upshaw ought not to be received as a Juror, because he believes that the treasonable design of the prisoner extended up to the time of the fact stated. *John Bowe, Miles Selden, Lewis Truehart, William Yancey, Nathaniel Seldon, John W. Ellis, Armisted T. Mason, and Dabney Minor*, were respectively asked, whether they had formed and maintained any opinion of the prisoner's guilt or innocence up to the time of the indictment. They declared in the affirmative, and were successively set aside.

Thomas Prosser was asked the same question by the Court. He answered that he believed that the prisoner had been forming a plan for some time; which when matured would have been treason.

Mr. M'Rae. Have you formed any opinion respecting the act committed on Blannerhasset's island. *Juror.* No: I have formed no opinion as to his being guilty of that act, or of any act of levying war; but that he was guilty of the intention; though I am rather of an opinion, that no overt act has been committed. I have formed no opinion respecting that transaction. *Mr. Wickham.* What specific reasons do you suppose Col. Burr had, for acting as you suppose he did? *A.* I had no doubt but his intentions were to separate the union by means of power. *Q.* If there were any transactions going on respecting New-Orleans, do you imagine that he was connected with them?

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A. I have never formed any particular opinion upon that subject. I do not know that ever he was engaged in such an expedition; but, I have no doubt of his intentions.

Mr. Burr. It was said that I had treasonable views in the western country: what is your opinion upon that subject; or, do you suppose I abandoned these views? *A.* I do not know that you abandoned those views. Your objects appeared to me derogatory to the welfare and peace of the U. S. and I have had no evidence that you abandoned those objects.

Chief Justice. The question relates to the intentions of Col. Burr, and whether he retained those treasonable intentions up to the time charged? *A.* That is my meaning, Sir, But I am doubtful whether those transactions were instigated by the directions of Col. Burr.

Mr. M'Rae. Have you formed ideas of any treasonable intention or acts, as to make an overt act on Blannerhasset's island? *A.* I am doubtful as to men being embodied there. I have seen no evidence to support any opinion on my mind, that the prisoner was privy to what has been said to be done there.

Court. Have you mentioned your opinions on the subject? *A.* I never have.

Mr. Baker. Have you never expressed your opinions since you have formed them? *A.* I am not certain that I have, but my opinions have been as I have expressed. I have frequently been in conversation on the subject generally; but what I have said particularly, at different times, I really cannot recollect. *Q.* Have you never since this transaction took place? *A.* I have as to the guilt of his intentions, but not as to his actions. This is what I have not formed an opinion upon.

A conversation ensued between Mr. Hay and the Court. *Mr. Hay* conceived it to be very difficult for a man not to have observed the current transactions as they were published; observing them, he must have received some impressions at least. Suppose they were unfavourable to the prisoner, what did the Court require by the question propounded? Why that he should believe the prisoner to have dropped the plan which it appeared he was carrying on before. Now the result of such an opinion as this, would be, that he was not guilty. He asked whether that was not forming an opinion? Could it be supposed, that a man who had once had any impression concerning the circumstances related, (which all men must have had,) would have dropt that impression, without some evidence should appear to change that impression? He could really perceive no middle course. The question of the Court seemed to require a change of impressions, when that change was scarcely to be expected; for the time between the public transaction and the time of the indictment, was too short and too barren of evidence to expect such a thing: there could be no man who had formed those impressions, with whom they would not have continued.

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The *Chief Juſtice* obſerved, that the teſtimony might perhaps preſent a great variety of plans and deſigns. A man might have ſuppoſed a certain deſign to have been formed at a certain time: for inſtance, that related in the affidavit of General Eaton; But he may be doubtful whether the priſoner went into the weſtern country to execute that plan or not. Now if he did ſuppoſe that the going there was to accompliſh what had been ſo long before related to Gen. Eaton, there was a great lapſe of time. If he had continued in that plan, therefore, up to the time of the indictment, according to the jurors opinion, it muſt be conſidered of more importance than the Attorney appeared to apprehend. The Court muſt feel a difficulty on it, becauſe there did not appear that clearneſs and deciſive impartiality that the rule ſeemed to require. It therefore muſt decide, that this jury having formed an opinion that Mr. Burr did intend to execute his projects, if he ſhould find an opportunity, (for this was plainly implied,) he muſt be ſet aſide.

The pannel having been gone through, Mr. HAY moved the Court to award a new *Venire*, and to be compoſed of ſuch a number as would be likely to give a hope of making up the deficient jurors. The Court could ſee that there was very little probability of obtaining a jury from any ſmall number. It muſt be evident that this was a peculiar caſe, and one which had ſo much taken the public attention from its notoriety, as to render it very difficult to procure ſuch men as would ſatisfy the priſoner. He believed it was a caſe unlike any one which had occupied any Court before, either in England or in this country. It was extremely deſirable to him, that a jury ſhould be obtained; and, therefore, he hoped the award would go even to ſummon 150 jurors.

Mr. BURR ſaid, he truſted that when the officer of this court ſhould be inclined to ſeek for impartial men, they would be found. He could ſcarcely think, that accident had thrown into this pannel, 47 out of 48 men of a particular train of principles.

Mr. WIRT roſe to vindicate the Marſhal, as a gentleman of unblemiſhed character; who ſtood highly reſpectable in life, whoſe candour and integrity admitted not of a ſtain; and whoſe name ſtood as high as any one in the ſtate. At leaſt, he hoped, that before ſuch inſinuations were permitted, he would be called into court to juſtify himſelf.

[A ſhort debate then took place, as to the number neceſſary to be ſummoned; and, after ſome obſervations by the Chief Juſtice, it was agreed that 48 ſhould compoſe the new *venire*, which was conceded to by the court.]

The Court then adjourned till Thurſday.

THURSDAY, Auguſt 18.

Mr. BURR obſerved, that juſt before coming into court he had received a copy of the pannel returned upon the *talis* awarded on

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Tuesday. If the Marshall would supply the additions, with relation to the occupation and residence of the persons named, he should be glad. It would probably take him to-morrow; and he believed, not more than to-morrow, to examine it. It would be observed, that the three entire days which he was entitled to, would not make the return until Tuesday: Sunday not being calculated as one.

The subject of the subpœna *duces tecum* to obtain the letter written by Gen. Wilkinson on the 21st October, was again called up to notice. Mr. HAY said, that he could not as yet find it among any of his papers, which were very voluminous; but, however, if the prisoner desired it, he would make another search. He had no doubt but Mr. Rodney had transmitted it among the other papers. But, however, if it could not be found, there was a correct copy of it, he presumed, in the possession of Gen. Wilkinson, which he had seen, and which could be had. He had found Gen. Eaton's letter, and had given it to the clerk to be filed.

BURR. A copy from the possession of Gen. W. will not do. I shall not be satisfied with it, but want the original. I by no means wish to give unnecessary trouble, but hope the attorney will complete the search among his papers.

Excuse was made in behalf of three persons summoned for the *venire*. They were excused from serving, and three others ordered to be summoned, so as to compleat the number of 48.

The MARSHAL said, that he did not find himself authorized to excuse any one, on any consideration, after he had summoned him; and, therefore, he was obliged to return persons in some instances who could not serve. The Chief Justice answered, that if the excuse was a substantial one, the Marshal had the power to excuse any from serving at any time before the pannel was compleated.

The Court adjourned till Saturday.

SATURDAY, August 15.

As soon as the Court met, the *Venire* was called over. It appeared that seven were absent; and one was excused from serving, on account of sickness.

Mr. *Burr* observed, that the pannel was now reduced to 40. Out of that number he was entitled to 34 peremptory challenges, which would reduce the remainder to six, when eight were wanting to complete the pannel. It was not his desire to cause a moment's delay; which was apparent, from his not requiring a longer time to examine the return. He would propose to the prosecutor to select out 8 men, which he believed he could do in five minutes, and that would put an end to all difficulties.

Mr. HAY had no objection. When they were named, it would be in their power to examine their qualification.

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The CHIEF JUSTICE suggested the propriety of placing these at the head of the pannel.

William S. Smith wished to be excused, should the accused consider him as one, on account of a disorder which had attended him for many years, and which would render him unfit to attend so long a service as this would probably be.

Mr. BURR said, they had so arranged the pannel as to place Mr. Smith on it; but in order to get a chance of leaving him out, he should, at present, pass his name over.

Christopher Anthony was called. He observed, that since he had been in town he had uttered some expressions, not having an idea of being called on the jury; which he had been informed would disqualify him, according to the rule of the Court.

Mr. BURR. If they do not lie strongly on your mind, so as to prevent you judging with impartiality from the testimony, I will depend upon your candour. Perhaps they were used in levity.

Juror. I will inform the Court what they were. When I first arrived in town, I met with an intimate friend, whom I informed, that I came down with a hope that I might be put on the jury; and if I was, that I would hang Col. Burr without any ceremony.

Mr. *M'Rae* Did you use these words, knowing they would disqualify you, or had they any meaning? *A.* No, I did not. *Q.* Did you speak as you thought? *A.* No! the expressions were not intended to convey any meaning: they were spoken in levity. *Q.* Have you been in the habit of reading the newspapers? *A.* I have. *Q.* Have you read the depositions of Generals Wilkinson and Eaton?

Messrs. Martin, Burr, and Wickham, objected to this question being put; and generally, to the rights of the counsel for the prosecution questioning their juror.

Chief Justice. If the Counsel for the United States mean to challenge Mr. Anthony for any other juror, for cause, they surely have an indisputable right to shew cause. But unless the challenge is made, it will be improper for them to draw out any expressions from the juror.

Mr. Burr. They have no right to ask a question, until they say they challenge for cause.

Mr. M'Rae. No right to ask a question? I beg the Court to recollect the course proceeded in by the gentleman the other day. My understanding of the case was, that he did not proceed correctly; and if I am now wrong, he was undoubtedly wrong then; but, he was not stopped. The prisoner himself made a number of general observations as to his right of peremptory challenge, and challenge for cause; And suggested to the jurors generally, and sometimes particularly, the propriety, if they knew of themselves any reason why they would not be proper jurors, that they should, themselves, voluntarily state any objec-

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tion which, in their own knowledge, ought to disqualify them. I recollect well that the Counsel for the U. S. objected to this course, as in his opinion incorrect; and that the answer of the prisoner was, that no juryman ought to lock up in his own bosom the prejudices which he had conceived, but make declaration of them. I recollect also, that without any challenge for cause whatever, the jurors as they came up, did of themselves proceed to express their impressions and words, without a single question from the prisoner or the Court: that they began as a matter of course to state their prepossessions to the Court. Mr. Botts, in very many instances at first, as soon as the juror appeared, asked him if he had any thing to state to the Court. In some cases there was the formality used of challenging for cause; but in the most, by far, there was not: And no objection was made to that omission, until, I recollect, Mr. Jerman Baker was asked if he had no declarations to make to the Court? He answered, "Not until he was challenged for cause." Then he proceeded to state his impressions. But, Sir, while I wish a juror to do justice to the prisoner, I wish the same justice to be done to the U. S. And hence it is, that we wish the same course to be adopted now, as was then. We do not know any reason why we should challenge the gentleman for cause who is now before the Court; but it is possible, he might have taken up a prejudice in favour of the prisoner; and let the prejudice be on which side it may, it is an equal objection. I have been pleased that such a strict examination has taken place; because it is my most earnest desire, that there should be a pannel who will give an impartial verdict. I know of no objection to either of the gentlemen selected: But I am determined to know, in some form or other, as well as I can, what state of impartiality they are in, between the U. S. and the prisoner at the bar. I mean not to offend the gentlemen by this necessary attention to my duty; and I am assured that they will afford to the Court every information necessary.

Mr. Hay did not mean to object to any gentleman on the pannel from any knowledge he had of them. It was no object to him of what description of men the jury was composed, so that they were honest, impartial men. He wished, however, that they should, respectively, be first asked by the bench, whether they were conscious of any reason why they ought not to serve. He could not think it possible that any man would lay his hand upon that book and swear to try the cause justly, who was not impartially open to receive and credit the evidence that should be presented to him in the Court.

Mr. Burr and his Counsel signified their acquiescence.

Chief Justice. The Court must undoubtedly direct the same mode of challenge on the part of the U. S. as on the part of the prisoner. But should any interrogatories be requisite, it ought to

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be on a challenge having been made. However, it appears to be the wiſh of gentlemen concerned in the proſecution, as well as thoſe in the defence, to have the voluntary declaration of the juror. The Court can have no objection to that mode. If the Court ſhould perceive any impreſſion has been made on the mind of a juror that might be cauſe of challenge, it will expect that challenge ſhall be made, in order to make further interrogation. The Court will proceed upon the ſame principle of objections as it yeſterday ruled, as to the opinion being made up upon the treaſonable intention, and that intention remaining. The Judge then addreſſed the *venire* :—Gentlemen, if any of you have made up, and delivered an opinion on the caſe—actually made up an opinion that the priſoner is guilty or innocent, and declared it—which opinion continued up to the time charged, the Court hope that you will declare it before you come to the book.

Mr. Burr. The law preſumes upon the innocence of every man, until after, by ſtrict and unalterable rules of law, he ſhould be found guilty. Therefore, every man properly qualified to be a juror, ought to come forward and declare that he believed the party he is going to try, to be innocent. Such is the ſtrict principle of law ; and ſuch is the principle of Chriſtianity. A man, therefore, who ſhould come forward and ſay that he believed me to be innocent, it cannot diſqualify him, becauſe he had no legal evidence of my guilt. But if a man ſhould declare, that he will acquit me at all events, he cannot ſerve on the jury. And ſhall not a man of a contrary diſpoſition be equally diſqualified ?

Chief Juſtice. If any man has formed an *active* opinion in the caſe—not merely *poſitive*, but *active*—the Court ſurely would object to him, whether it was upon the guilt or innocence.

Mr. Anthony. I ſhould be very unwilling to ſerve on the jury, becauſe I conſider myſelf diſqualified ; and thinking ſo, becauſe the rule had diſqualified others who held the ſame opinion with me. I wiſh to be excuſed.

Mr. Burr. Having determined to let this trial go on as ſpeedily as poſſible, I muſt ſubmit to the inconveniency of having ſome gentlemen who perhaps have entertained a prejudice againſt me. The candour of Mr. Anthony induces me to make no objection.

John M. Sheppard was called. He conceived himſelf to be diſqualified to paſs between the priſoner and the country, as he had fully made up his mind, particularly from the depoſition of Gen. Eaton. He had believed that the priſoner had intentions hoſtile to the peace and ſafety of the U. S. and he ſtill believed it ; and that he would, at any time, have overthrown the government, if he had had it in his power. It would be inflicting a wound to his own boſom, if he was to be compelled to ſerve. This was his moſt ſerious impreſſion. Added to this, was a conſideration of a domeſtic nature—the extreme ſickneſs of a child, upon which he wiſhed to be excuſed.

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Mr. Burr said, he would not wantonly impose the service upon any gentleman: he should not object to any impressions Mr. Sheppard had formed. It was with reluctance that he should dispense with his services. He might stand aside, until it could be seen whether a jury could be obtained without him.

James Sheppard made no declaration. He was *elected*.

Reuben Blakey said, he had made up no positive opinion either way. He was *elected*.

John Fitzgerald. It is incumbent on me to say, that I have formed, and delivered an opinion respecting Col. Burr. My opinion has been, and now is, that his intentions were hostile to, and treasonable against the U. S. I have entertained this opinion ever since reading the depositions of Gen. Wilkinson and Gen. Eaton, and other publications on the subject. On that account, I would not willingly serve upon the jury. He should be afraid of possessing an unfavourable bias. Having been much engaged in public life, it appeared incumbent on me to express my opinions more than, perhaps, I otherwise should have done.

Mr. Wickham. Are you in the Legislature? *A*. I am elected to the next Legislature. [Mr. F. was desired to sit down for a short time.]

Miles Botts. From the affidavits of Gen. Wilkinson and Gen. Eaton, my opinion was compleatly made up, and delivered at different times several months ago.

Mr. *Martin*. I suppose it has been only made up in this way: that if the facts were true, and not contradicted by other testimony. *A*. I have made it up so far as to say that Col. Burr ought to be hung.

Mr. *Burr*. Is your opinion so settled in your mind as to suppose that you would not be able to give an impartial judgment, or that you would not listen to any thing that may be offered? *A*. Upon my word I do not know: human nature is very frail; I would not say any way. Perhaps very lately I have expressed myself so. *Q*. Do you still retain it as your deliberate opinion, or is it an opinion about which your mind is suspended?—It is a disagreeable service, but I hope you have not made that a reason of your objection? *A*. I do not conceive myself to be a proper juror. I might, however, be biassed from the former opinion I had made up.

Mr. BURR. It must be evident that I am under the necessity, either of taking some gentlemen labouring under a very strong prepossession against me; or, of encountering the great delay of another *talis*. I will not, therefore, challenge the gentleman, but rely on his candour, under the persuasion that he will listen to the evidence. I must submit to prejudices of this kind, or submit to a farther delay.

Four jurymen having been selected, the following were sworn,

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to wit: Meſſrs. *James Sheppard*, *R. Blakey*, and *M. Botts*—Mr. *Anthony* affirmed.

Henry Coleman was called. Whenever this ſubject has been canvaſſed in my preſence, I have always thought and ſaid that the proceedings of Col. Burr were enveloped in a myſtery; and that I believed they were aimed againſt the peace and welfare of the U. S. And, when I was informed by the papers, that he went down the river with an armed force, I believed and felt, as every citizen of this country ought to feel; under theſe circumſtances, I cannot be called impartial.

Mr. *Burr*. If he has not gone ſo far as to prejudge the caſe, we muſt accept of him.

Juror. I have not prejudged the caſe, not having ſeen the evidence.

Mr. *Burr*. That is enough. The juror is *elected*.

John Curd was excuſed on account of a diſorder (a palpitation of the heart,) which frequently affected him, ſo as to render him entirely unfit for any kind of buſineſs.

Iſham Godwin declared, that he had not only made up his mind, but uniformly declared that the priſoner was guilty of treaſon; and that, if he was impannelled, theſe prejudices would ſo attend him, as to render him unfit to try the caſe. [*Excuſed.*]

Benjamin Graves ſtated his domeſtic difficulties. He was deſired to make ſuch arrangements as to come on Monday; as it had been before ſuggeſted, and determined upon mutual agreement that the whole of the Jury ſhould not be ſworn on this day, ſo as to confine them to ſtay together on the next day, (Sunday,) in their room.

At the ſuggeſtion of both parties, the Court enjoined on the Jurors, not to mix unneceſſarily with any company, or hold converſation with any one on this caſe: to which ſtrict duty both their honour and their oath imperiouſly prompted them.

The Court then adjourned till Monday.

MONDAY, Auguſt 17.

CHARLES LEE Eſq. appeared as Counſel for the priſoner.

Mr. HAY ſtated ſome little difficulty which had occurred between Mr. Botts and himſelf. He had furniſhed the priſoner with a liſt of the names of ſuch witneſſes, and with their places of reſidence, which had been in his poſſeſſion. He had likewiſe propoſed, and Mr. Botts had conſented, that all ſuch witneſſes ſhould be examined, whoſe names ſhould be furniſhed to the priſoner before the commencement of the trial. He had furniſhed the names of three on Saturday, viz. Meſſrs. Neil, Goodwin and Jones; which Mr. Botts did not think ought to be accepted, becauſe they were not furniſhed previous to the trial. For his own part, he did not think that the trial could be ſaid

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to have commenced before the jury were ſworn and impannelled.

Mr. BOTTS denied the exiſtence of any ſuch agreement between Mr. Hay and himſelf; and entered into a ſong ſtatement to ſhew that Mr. Hay was miſtaken. For the truth of his aſſertions, he appealed to the record of the Court. However, he would agree, as a matter of voluntary motion and grace to the introduction of theſe three witneſſes.

Mr. HAY ſolemnly expreſſed his belief in the accuracy of his ſtatements; but as he was at liberty to introduce theſe three witneſſes, he would let the ſubject reſt, where it was at preſent.

The names of the ſelected Jurors and of the Venire were then called over. After which *John M. Sheppard* and *Richard Curd* were ſelected.

The PETIT JURY impannelled, conſiſted of the following gentlemen:—

Edward Carrington,	City of Richmond;
Richard E. Parker,	Weſtmoreland County;
David Lambert,	City of Richmond;
Hugh Mercer,	Spottſylvania County;
Chriſtopher Anthony,	Goochland County;
James Sheppard,	City of Richmond;
Reuben Blakey,	Henrico County;
Benjamin Graves,	Cheſterfield County;
Miles Botts,	Do.
Henry Coleman,	Halifax County;
John M. Sheppard,	Hanover County;
Richard Curd,	Henrico County.

Proclamation then having been made in due form, the priſoner ſtanding up; the clerk read the copy of the indictment, and afterwards addreſſed the jury in the uſual form.

VIRGINIA DISTRICT.

IN THE CIRCUIT COURT OF THE UNITED STATES OF AMERICA, IN AND FOR THE FIFTH CIRCUIT AND VIRGINIA DISTRICT.

The Grand Inqueſt of the United States of America, for the Virginia Diſtrict, upon their oath do preſent that AARON BURR, late of the city of New-York and ſtate of New-York, attorney at law, being an inhabitant of and reſiding within the United States, and under the protection of the laws of the United States, and owing allegiance and fidelity to the ſame United States, not having the fear of God before his eyes, nor weighing the duty of his ſaid allegiance, but being moved and ſeduced by the inſtigation of the Devil, wickedly deviſing and intending the peace and tranquillity of the ſaid United States to diſturb and to ſtir, move and excite inſurrection, rebellion, and war againſt the ſaid United States, on the tenth day of December, in the year of Chriſt, one thouſand eight hundred and ſix, at a certain place called and known by the name of Blannerhaſſet's iſland, in the county of

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Wood and District of Virginia aforesaid, and within the jurisdiction of this court, with force and arms, unlawfully, falsely, maliciously and traitorously, did compass, imagine and intend to raise and levy war, insurrection and rebellion against the said United States; and in order to fulfil and bring to effect the said traitorous compassings, imaginations and intentions of him the said Aaron Burr, he the said Aaron Burr afterwards, to wit; on the said tenth day of December, in the year one thousand eight hundred and six, aforesaid, at the said island, called Blannerhassett's island as aforesaid, in the county of Wood aforesaid, in the District of Virginia aforesaid, and within the jurisdiction of this court, with a great multitude of persons whose names at present are unknown to the Grand Inquest aforesaid, to a great number, to wit; to the number of thirty persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords and dirks, and other warlike weapons as well offensive as defensive, being then and there unlawfully, maliciously and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States, and then and there with force and arms did falsely and traitorously and in a warlike and hostile manner, array and dispose of themselves against the said United States, and then and there, that is to say, on the day and in the year aforesaid, at the island aforesaid, commonly called Blannerhassett's island, in the county aforesaid of Wood, within the Virginia District and the jurisdiction of this court, in pursuance of such their traitorous intentions and purposes aforesaid, he the said Aaron Burr with the said persons so as aforesaid, traitorously assembled and armed and arrayed in manner aforesaid, most wickedly, maliciously and traitorously did ordain, prepare and levy war against the said United States contrary to the duty of their said allegiance and fidelity, against the constitution, peace and dignity of the said United States, and against the form of the act of the Congress of the said United States in such case made and provided.

And the Grand Inquest of the United States of America, for the Virginia district, upon their oaths aforesaid, do further present, that the said Aaron Burr, late of the city of New-York, and state of New-York, attorney at law, being an inhabitant of, and residing within the United States, and under the protection of the laws of the United States, and owing allegiance and fidelity to the same United States, not having the fear of God before his eyes nor weighing the duty of his said allegiance, but being moved and seduced by the instigation of the Devil, wickedly devising and intending the peace and tranquillity of the said United States, to disturb and to stir, move and excite insurrection, rebellion and war against the said United States, on the eleventh day of December, in the year of our Lord one thousand eight hundred and six, at a certain place called and known by the name of Blannerhassett's island, in the county of Wood and district of Virginia

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aforesaid, and within the jurisdiction of this court, with force and arms, unlawfully, falsely, maliciously and traitorously did compass, imagine and intend to raise and levy war, insurrection and rebellion against the said United States; and in order to fulfil and bring to effect the said traitorous compassings, imaginations and intentions of him the said A. Burr, he the said A. Burr afterwards, to wit: on the said last mentioned day of December in the year of our Lord one thousand eight hundred and six aforesaid, at a certain place commonly called and known by the name of Blannerhassett's island in the said county of Wood in the district of Virginia aforesaid, and within the jurisdiction of this court, with one other great multitude of persons whose names at present are unknown to the Grand Inquest aforesaid, to a great number, to wit: to the number of thirty persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords and dirks, and other warlike weapons, as well offensive as defensive; being then and there unlawfully, maliciously and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States; and then and there with force and arms, did falsely and traitorously and in a warlike and hostile manner, array and dispose themselves against the said United States, and then and there, that is to say, on the day and in the year last mentioned, at the island aforesaid, in the county of Wood aforesaid, in the Virginia district, and within the jurisdiction of this court, in pursuance of such their traitorous intentions and purposes aforesaid, he the said A. Burr, with the said persons so as aforesaid, traitorously assembled and armed and arranged in manner aforesaid, most wickedly, maliciously and traitorously did ordain, prepare and levy war against the said United States, and further to fulfil and carry into effect the said traitorous compassings, imaginations and intentions of him the said Aaron Burr, against the said United States, and to carry on the war thus levied as aforesaid against the said United States, the said Aaron Burr, with the multitude last mentioned, at the island aforesaid, in the said county of Wood, within the Virginia District aforesaid, and within the jurisdiction of this court, did array themselves in a warlike manner, with guns and other weapons, offensive and defensive, and did proceed from the said island down the river Ohio in the county aforesaid, within the Virginia District and within the jurisdiction of this court, on the said eleventh day of December, in the year one thousand eight hundred and six aforesaid, with the wicked and traitorous intention to descend the said river and the river Mississippi, and by force and arms traitorously to take possession of a city commonly called New-Orleans, in the territory of Orleans, belonging to the United States; contrary to the duty of their said allegiance and fidelity, against the constitution, peace and dignity

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of the said United States, and against the form of the act of the Congress of the United States in such case made and provided.

HAY, *Attorney of the United States for the Virginia District; Endorsed*—"A true bill—John Randolph."

A Copy, Teste,

WILLIAM MARSHALL, Clk.

Mr. Hay, in opening the case!

May it please the Court and you Gentlemen of the Jury:

In the preliminary stages of this prosecution, many observations were made extremely derogatory to the character of the government of the United States, and highly improper for an accused person to utter. Among other things, it was boldly declared by those gentlemen, that we had indulged a zeal against the prisoner, which transgressed all bounds of moderation, and even outraged humanity; that we were anxious to convict him, even if innocent; and to deprive him of all those means of defence which justice and law have afforded him. I do not know, gentlemen of the jury, whether you have heard those things or not; or, if they have reached your attention, whether they have made any impression or not: but lest they should have operated upon your minds, it is my duty to endeavour to efface them. But, gentlemen, how is this to be done? By my professions of candour, of liberality, and of humanity? Professions as easily made as forgotten! No; I will prove to you that the charge is *unjust*, by the course which I shall pursue in the management of the trial. We have now come to a serious, solemn and interesting part of this enquiry, upon the result of which rests the life of a man and a fellow-citizen: a fellow-citizen who once stood high in the estimation of his country. It is alledged, that by his conduct he has forfeited his life to the justice and violation of the laws of his country. It has become my duty to support that allegation. But, if I know myself, if I can venture to speak of myself, where my own feelings and my duty are so deeply concerned, I shall support that allegation only by facts which I believe to be true, and by fair arguments which have already wrought a conviction in my own mind of the guilt of the prisoner.

The prisoner at the bar stands charged with treason, in levying war against the United States: to this charge he has pleaded not guilty. It is your high and solemn duty, gentlemen, to decide whether this charge is true or not; and you have sworn to give your verdict according to the evidence given in your hearing. If you attend to the words of that oath, any admonition from me respecting the course that you ought to pursue, will be totally unnecessary. If you decide the case according to the evidence, you will divest your minds from any bias, occasioned by what you have heard out of doors; or of any course which the case has taken; or of any political feelings or prepossessions whatever; and enter into this enquiry with candour, impartiality, and attention; forming a serious determination to do justice between the accused

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and your country. If, after such a dispassionate and minute investigation as I am sure you will give the case, you shall not be perfectly satisfied of the guilt of the accused: if you have the least doubt whether he is guilty or not; it is your duty to say he is not guilty. This is the language of law, humanity, and common sense: because you cannot find the prisoner guilty, if you doubt at all on the subject; if you cannot bring your minds to a positive declaration. But, gentlemen, there is one distinction which I have sometimes heard made by jurymen, which I would call your attention to. It appears to me to be a distinction without a difference, and, in my opinion, is founded in folly. I have heard jurors interrogated as to the verdict, who said, that though they were satisfied as to the application of the evidence to the prisoner, they were not so as to their own judgment. Now I cannot think but a juryman may entertain an impression from what he has heard before he came to try the cause, and which he will find is not supported by legal evidence; but it is a poor, miserable fallacy, for him to doubt of his own capacity: a fallacy which I can hardly believe any man of sound discernment would entertain. If the juror is satisfied of the guilt of the prisoner upon the legal evidence, he need not be apprehensive of any former impressions; but he is bound by his conscience, to his God, to his country, and to himself, to render a verdict.

This indictment, Gentlemen, consists of two counts. The one charges the prisoner with levying war against the United States, by assembling a number of persons for a warlike purpose on Blannerhasset's island: The other count, though the same in substance, adds, that in order to complete the treasonable design, and make it more effectual, the prisoner, with a number of persons as aforesaid, descended the river Ohio and the Mississippi, to take New-Orleans by force, as a part of another great design which he had in view. Now if either of these counts can be proved, you are bound to find the prisoner *guilty*: if not, or if you have a doubt on the subject, you must return your verdict *not guilty*.

In Great Britain there are no less than ten different species of Treason: at least it was so when Blackstone wrote. They may have decreased since that time, perhaps: I cannot say. But in this country, by our constitution, there are only two descriptions of Treason; and as these descriptions are contained in the Constitution itself, the number never can be increased by any power vested in the legislature, however important it may be in their opinion. The mode of obtaining constitutional amendments, is pointed out in the instrument itself. The 3d sect. of the 3d article of the constitution, contains these words, as the only specification of what the crime shall consist in. "Treason against the United States shall consist only, in levying war against them: or in adhering to their enemies, giving them aid and comfort."

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The latter clause of this description is not necessary for our present purpose, as the crime now charged is "levying war" against the U. S. The offence, gentlemen, being thus defined by the constitution, and divested of any equivocal or unnecessary words, the only question is, "What shall constitute the overt act of levying war against the U. S. agreeable to the constitution and laws of this country?"

If treason, then, consists only in "*levying war*" against the U. S. it is obvious that the interval between the first movements of a treasonable conspiracy, and that actual hostility against the country which constitutes treason, or actual battle, is immense. There may be a conspiracy to levy war; individuals may meet together and traitorously determine to go to their respective designations, and execute their respective parts in the hostility; they may make arrangements to bring forces into the hostile field; and yet this conspiracy, however vicious in its nature or avowal, is not Treason. The conspirators may go a step farther. They might not only form an agreement amongst themselves of a treasonable nature, but they might actually proceed to enlist troops for the purpose of prosecuting objects of a warlike nature. But even this is not to be denominated the overt act of levying war. It has also been adjudged by the supreme Court of the U. S. that the persons concerned, may yet go one step farther, and still be on the safe side of the line. It has been adjudged, that the travelling of individuals in separate bodies to the place of rendezvous, is only a conspiracy; and unless guilty of some other conduct than marching merely, it is not treason. But, gentlemen, common sense, founded upon principles of national safety, certainly require that the crime of treason should be declared to be complete before the actual commencement of hostilities against the government. If hostilities must be committed—if force must actually be employed, before treason shall be said to be committed—what must be the inevitable result? Why that no man is a traitor, until he has brought himself into a flagrant attitude of defence, so as to bid defiance to the government, and laugh at every measure it may take to oppose him. If he is a man of common understanding, he will not strike a blow, nor make any treasonable appearance, until that blow shall have been sufficiently premeditated to be complete and fatal to his object.

What is the point then, gentlemen, at which a treasonable conspiracy shall be said to be matured into treason itself? what, in other words, shall be said to be the over act of levying war in this country? The answer is, that *where there is an assemblage of men convened together, for the purpose of effecting by force, a treasonable design which force is meant to be employed before their dispersion—it treason.* The answer which I have given is not, precisely the literal answer of the Supreme Court, in a case similar to this;

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but it is substantially the same. I do not know, indeed, that the precise question which was discussed before the supreme Court of the U. S. has ever been fully and fairly presented to any of the judicial tribunals in this country. Many cases have been reported, which contain the doctrines and sayings of the Judges individually on the subject; but I know of none, where a Court have been called upon to authenticate and establish a principle. The opinion of the Supreme Court, in the case of Bolman and Swartwout, after a serious consideration of the Bench, was delivered, and contained this sentiment. "It is not the intention of the Court to say, that no individual can be guilty of this crime, who has not appeared in arms against this country. On the contrary, if war be actually levied; that is, if a body of men be actually assembled for the purpose of effecting, by force, a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." I am warranted, therefore, in the answer which I have given to the question propounded by myself; these are the words, as well as the meaning of that solemn decision of the supreme judicature of our country. And it is not in this place alone that we find it; but the same ideas are expressed in ten or fifteen parts of that decision; where the utmost coincidence of language, as well as meaning, is preserved. If, then, the accused can be proved to have met, or procured the meeting together of, a number of persons; and that the object was to obtain a disseverment of the union, although that object was not accomplished, and although no *actual* force was used, and no battle was fought; yet such a meeting, for such a purpose, must be *Treason*.

Again. The opinion of the Supreme Court reads thus: "To complete the crime of levying war against the U. States, there must be an actual assemblage of men, for the purpose of executing a treasonable design." Now any assemblage of men might do for that purpose; the scheme against New Orleans might have been intended as the first grand step, and the capture of the Spanish provinces as the ultimate object. But there must be an assemblage of men. The travelling of individuals would not constitute an *assemblage*; but the assemblage and marching of men, from a *partial*, to a place of *general* rendezvous, would make the guilt of an overt act of levying war. So says this Supreme Tribunal in another place. "In the case now before the Court, a *design* to overturn the government of the U. S. at New Orleans, *by force*, would have been, unquestionably, a design which, if carried into execution, that would have been *Treason*; and the *assemblage of a body of men*, for the purpose of carrying it into execution, would amount to *levying war* against the U. S. but no conspiracy for this object; no enlisting of men to effect it, would be an ac-

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tual levying of war." Again—"If, then, according to this definition, the accused and his associates had assembled together to attack New Orleans, and separate it from the Union, *though no actual force had been used—though no battle had been fought*—they would have been guilty of treason." "It cannot be necessary that the whole army should have assembled, and that the various parts which are to compose it should have combined; but it is necessary that there should be *an actual assemblage*. The meeting of particular bodies of men, and their marching from places of partial to places of general rendezvous, *would be such an assemblage*." From these circumstances, then, I am warranted, by the solemn decision of the supreme criminal tribunal, to say that the overt act of treason has been committed.

Gentlemen, the circumstances of this case are new; and it is my desire explicitly to communicate to the prisoner and his counsel, the grounds upon which the prosecution is meant to be supported, in order that they may have it in their power to make that defence which a full view of the subject will enable them.

I solicit your attention, therefore, while I state for your consideration, and for their's, the reasons which have induced me, in this description to omit mentioning two circumstances, which, perhaps, the counsel may think very essential parts in the definition of Treason. In the description which I have just given, no notice is taken of arms, military weapons, or military array.—Nor have I stated, as an essential requisite or composition of treason, that any *actual force*, violence or hostilities, should be used for the purpose of obtaining the treasonable object. I have stated neither, because I believe that neither of them is essential in the composition of treason according to the constitution of our country.

On the first point, that military arms or array is not necessary, I shall offer you a few remarks. Before I endeavor to satisfy you of the legal propriety of the omission, I shall beg leave to state its propriety upon the principles of *common sense*. In legal discussions, however, let me observe, it is not always customary to carry common sense along with it from the beginning to the end: it is unhappily too often omitted, and this omission is often a subject of deep regret. Let us then consider this subject, not as it is presented to us by Lawyers and Judges, but as it is exhibited upon the plain principles of common sense, expediency, and national policy.——I say that it is not necessary that the persons thus assembled should be armed. The act of treason might be committed, even if the persons concerned have not a gun, or any other weapon, even a pen knife to employ in the transaction. I will put a case. There has been a time when there have been 10 or 15,000 stand of arms under the roof of this Capitol. Suppose that a few persons should meet together near this city, to deliberate with the preconcerted design of al-

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lembling a great number of men, say 5 or 10000 in the neighborhood. The men are aſsembled, and they prepare to march and ſeize the arms in this Capitol, and to uſurp the reigns of government. Let us then ſuppoſe that the inhabitants of this city, the cavalry, and the infantry, array themſelves, gird on their arms, and aſsemble with a firm determination to diſperſe this unlawful aſsemblage of men, before they ſhould have it in their power to effect their object. They march againſt theſe traitorous conſpirators, who, finding themſelves overpowered by their opponents, fly in every direction, and no man dares to lift his hand, or to own himſelf to be of the party. Now, I aſk your ſound ſenſe to ſay, Gentlemen, would not they be traitors to their country? They aſsembled together in great numbers for the purpoſe of ſubverting the government; but, before they could effect their abominable object, they are ſcattered. They would be traitors without a diſpute. Or ſuppoſe a number of men aſsembled on Blannerhaſſet's iſland. Suppoſe (which I believe was not the fact) that they had no arms, but that they met there for the purpoſe of deſcending the Ohio and the Miſſiſſippi, for the purpoſe of ſeizing upon New Orleans. They calculate upon meeting with their leader at the mouth of Cumberland river; and they are told that either there, or at Baton Rouge they are to get arms. They have no arms on the iſland, or on the river; but, would it not be an abſurdity, and a violation of the principles of common ſenſe; to ſay that they are not traitors, becauſe of this ſimple circumſtance? Can the poſſeſſion of muſkets alone conſtitute the act of treaſon? In my view, the ſupreme Court have given a correct definition of treaſon when in that definition they have not ſaid a ſingle word about the neceſſity of arms; but if I have read it right, they have ſaid arms are not neceſsary to make the crime treaſon. If not, what would be the reſult? Why, that whenever a number of conſpirators had fixed upon any object, they would determine never to touch their arms until they touched them to ſtrike the fatal and efficacious blow. It is not neceſsary, then, upon principle of ſound ſenſe, national juſtice and experience, that the poſſeſſion of arms ſhould conſummate the act of levying war, and make only be treaſon. In the opinion of the Supreme Court I will find, that there is not one ſingle ſolemn word ſaid as to the neceſſity of arms to conſtitute the act of treaſon. This is a principle noticed and ſupported by one of the Judges of the Supreme court, (Chaſe) in the trial of Fries p. 197. "Military weapons—as guns, ſwords, &c. (as mentioned in the indictment) are not neceſsary to make ſuch inſurrection or riſing amount to levying war. The *legal guilt* of levying war, may be incurred without the uſe of military weapons or military array." "The criterion to determine whether acts committed are treaſon, or leſs offence, as a riot, is the *quo animo*, or the intention

with which the people did assemble." Now I think these doctrines are correct. But it is somewhat remarkable, that this doctrine was conceded by Mr. Dallas, the prisoner's counsel. I do not mean to read the concessions of counsel as any legal authority, by which you may be governed, but as a strong argument that the law is clearly so, when the counsel acknowledged it against himself. He says, p. 108—"As on the one hand, I grant that the circumstance of military array is not necessary to an act of treason, if the intention is traitorous; so I insist, on the other hand, that the circumstance of military array will not constitute treason without such intention."

In Great Britain, treason by the statute of 25th of Edward the third, is described in the very identical words in which it is described in our constitution. It is there called "levying war against the king." When, therefore, the framers of our Constitution, (many of whom were lawyers of distinguished talents) thought proper to define treason in the very words of the English statute, it certainly is to be presumed that they thought these words, thus used, were to be used in the sense annexed to them by the frequent adjudications of the English bench. I shall trouble you, gentlemen, with the authority of Judge Iredell, to support this opinion; and will read his own words from Fries's trial p. 166-7. "When this constitution was made, it was in the power of those who formed it, either to define treason or not; or if they thought proper so to do, to do it in what manner they chose." "Now I must confess, as these able and learned framers of our Constitution, borrowed the act, in terms, from the British Statute alone, (an authority with which they were familiar,) that they at least meant that the *English authorities and definition* of those terms should be much respected." The only purpose for which I have made any reference to British laws or authorities, is to shew that the decision of our supreme court—(that decision which I rely on) is not any innovation; but that well-tried doctrine which has operated on the experienced Judges of England for ages, in construing these very identical words we have borrowed.

This well-established doctrine may be also seen in Foster, 209 who declares that treason by levying of war, might be committed though the persons committing it may not be actually provided with arms. They make nothing with the court; for the only criterion of the action, is the *quo animo*, (the intention) with which the act is committed. Now if a number of men assemble together, (with or without arms) for the purpose of executing some important object, as the taking of N. Orleans; that assemblage, if it was in motion towards the place, would, according to the decisions of the English Courts, be treason. This opinion of Justice Foster is quoted in 1 East, p. 67; who is also clearly of opinion, that it is not necessary to prove either military weapons or military array, to constitute treason.

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I have thought it proper to enter so minutely into this exposition of the law, in order to shew that we were supported by the experienced authorities of that country from whence we borrowed our system of laws: though I did not think it absolutely necessary because our own courts have decided that point in language too plain to be misunderstood. And because, it probably will turn out, from the testimony, that the persons who were assembled on Blannerhasset's island, were actually armed, and prepared for offensive as well as for defensive purposes. I have stated to you gentlemen, that there were two counts in the indictment. Now as to the want of arms or military array, I shall leave you to judge from the authorities and reasonings which I have introduced to you.

The other part I would mention, is this: that the persons stated to have been so assembled, not having committed any actual hostility, does not prove that no treason, or overt act of *levying war* has been committed; for it may be committed, tho' no battle is actually made, and though no act of violence whatever was discovered. I think I have shewn, that the act is complete the moment that a number of persons assemble together with a traitorous design to obtain an object, the attainment of which would be treason. It may, perhaps, be said by some gentlemen, that there must be arms in the hands of the conspirators; and that there must be force employed by them, before they can have committed treason. Should the counsel take upon themselves the proof of this position, observe the difficulties and embarrassments they would involve themselves in. The doctrine would lead to this consequence: and 10,000 men were to assemble, armed and arrayed in a warlike manner, in the pride, pomp and circumstances of war, and march against the capitol of the United States for the express and avowed purpose of sending the President to Monticello; turning Congress out of doors, and taking possession of the reins of government—all this might be done, and yet the persons entering and avowing this traitorous intention, and fully prepared to carry it into execution by force, are not to be called traitors, if those who are entrusted with the government of our affairs, knowing the character and force of this assemblage, should not be able to oppose them and quietly give up the city at their demand; and thro' fear, or for want of an adequate force should permit them to possess it! No violence has been used in such a case, because no opposition was made to them. They had nothing to encounter; and therefore, they did not use force; and not using force, they are not traitors according to this idea. Now the doctrine that makes force an essential ingredient in the commission of treason, is in my estimation the most dangerous and fatal that can be conceived. It is the very doctrine that traitors themselves would be most solicitous to establish, had they the power of devising laws to carry into effect their own machinations

They would have nothing else to do, but to be upon their guard, and not to lift their hand till they believed it would be *felt*. Now gentlemen of the jury, I think the absurdity of this must appear; and that the more you review the doctrine established by the Supreme Court, the more it will be unequivocally justified in your understanding; for in that opinion, there is not, from one end to the other, the least encouragement to this absurdity.

I do not know, however, but the counsel for the accused might take shelter under some expressions which may be found in the trial of Fries, used by Judge Chase, from which it might be inferred that he thought *force* necessary to make the treason. But I think that in reality the subject was not distinctly before the Court; and therefore, he may not have formed any distinct ideas upon it. But, admit for a moment, that he does say that actual force is necessary to the commission of treason—I would answer, that it is only the opinion of a single Judge, uttered in a subordinate Court; and, therefore, cannot have a counter tendency to the opinion of the Supreme Court in session. Besides, his opinion was extra-judicial, when I say extra-judicial, I only mean that it did not form a part of the judgment before them: and he decided it incidentally and not necessarily. It was not a question before the Court, whether force did enter into the composition of treason; for, in the case of Fries, there can be no doubt but force was used; it was a case of actual opposition to the laws and lawful authority of the U. S. Now it is an axiom, that nothing is considered as an authority in any Court, except it be a decision upon the very identical point which brings the question into view. Besides it will appear, that in the opinions of Judge Chase on this point, he is perfectly inconsistent with himself. Sometimes he advocates the doctrine as here advocated; and, at another time, he expresses himself differently. I mean, not by this observation, to retract from the intellectual merits of this gentleman; for, it will be observed, that as great, or greater men than Judge Chase have sometimes differed from themselves. I think East states, that even the great Justice Hale does not always correspond with his own sentiments. Thus we see him in p 196 of Fries's trial, saying, "that any insurrection, or rising of any body of people within the U. S. to attain or effect, *by force*, or violence, any object of a great public nature, or of public and general (or national) concern, is a levying of war against the U. States, within the contemplation and construction of the constitution." Now this is the very doctrine for which I contend; for he does not say a word about *military weapons* or the *actual employment* of force, before the crime is committed: but that a rising and insurrection of a certain nature, is treason. But then, after having stated this in language as precise and strong as the English language will bear, we find him in the next page discarding the very idea of military weapons; and yet he seems to infer, that *some force* must be em-

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ployed to constitute the legal crime of treaſe .. I will not, however, pretend to reconcile theſe ſeeming d ferences, although he ſays, in p. 197, that *some actual force* or *violence* muſt be uſed in purſuance of ſuch deſign to levy war; becauſe, as I before obſerved the expreſſion was not uſed in relation to any point *then* before the Co u t; there being no doubt in the world, but actual force had been uſed by the inſurgents at Bethlehem; and therefore, it cannot be properly uſed as an authority.

I think, gentlemen, that I have proved to you, that any argument ſhewing the neceſſity of *force, array*, and the like, is incompatible with public ſafety, ſound ſence, or national welfare; and that the doctrine is not ſupported, nor warranted by the Supreme Court—but only upon the *dictum* of Judge Chaſe, when the queſtion was not under his conſideration. In 2 Dallas, 335, Judge Patterſon lays down the ſame doctrine; and, that too, when the queſtion was before him. In ſupport of this, let me alſo refer you to Mr. Lewis, one of the counſel for Fries, in page 141. This gentleman was not leſs remarkable for his ſplendid legal talents and accuracy, than he was for the zeal and avidity with which he defended the priſoner. But Mr. Lewis does not ſay a word about the actual employment of force being neceſſary; but even if they take up arms, and array themſelves againſt the government, without a ſingle attempt to force, they are traitors. Such I take to be the Law; and ſuch is the Law, as admitted by the moſt able and zealous defenders of the rights of thoſe who have been proſecuted for treaſon.

Beſides. We are warranted in this opinion by the Engliſh adjudications. Foſter, in 211, to ſhew what is levying war, ſays—"it is an inſurrection to overturn the government by force," &c. And again. So in p. 218—"an aſſemblage of men, armed and arrayed in a warlike manner," is levying war, altho' nothing be done. So in 1 Eaſt, 67, Hale 146. It is levying war, altho' no force be *employed*, if the traitorous object is aſcertained. But whether I am correct in my expoſition of Engliſh law or not, is totally immaterial; as I truſt, gentlemen, that you are perfectly diſpoſed to pay reſpect to what you ſhall believe, know and ſee: And if, according to the deciſion of the Supreme Court, neither arms nor force are neceſſary, in order to conſummate the act of Treaſon, you will only enquire whether there was an aſſemblage of armed men at Blannerhaſſet's iſland; and whether that aſſemblage convened for a traitorous purpoſe.

A certainty, in all criminal laws, is neceſſary; and I have no doubt, but that you will be told by ſome of the gentlemen who oppoſe us, that in Treaſon it is eſſential to public liberty. I ſuppoſe you will be reminded of what an able and celebrated writer (Monteſquieu) obſerves—"that an uncertainty in law, is of itſelf ſufficient to convert a free government into an arbitrary one." This obſervation, however, is not quite applicable to the free re-

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preſentative government enjoyed in this country—informed as the people are of their rights. But, however true the remark might be, it does not apply in the preſent caſe. The law, as it is pronounced, is certain: the deciſion of the Supreme Court, has proclaimed at once to the people of the U. States the exact point to which they may go, and not commit treaſon; and the point beyond which they cannot take a ſingle ſtep, without ſubjecting themſelves to the puniſhment due to ſuch an enormous crime.—The court have ſaid, that a conſpiracy to levy war; an enliſting of men, or marching to the place of rendezvous, is not treaſon; but, that an aſſemblage of men, with a traitorous deſign, is treaſon. Here the volume of the law is open before us, and every man can ſee its preciſe dictates.

It is ſcarcely neceſſary to ſay any thing about conſtructive treaſon. This has been a topic of much legal notice in Great Britain; and, it has alſo received ſome very animated debates in this country. You, gentlemen, may be warned of the danger of their introduction here, with as much ſeriouſneſs, as though we were going to recommend it here. But if you view the abſurdity of ſuch an imputation to us, you will wonder how ſuch arguments can be uſed; except it be to blind the Jury, in order to introduce a confuſion of ideas, where every thing is as plain as words can pronounce it. 4 Blackſtone, 75, tells us what his ideas of conſtructive treaſon were,—"To raiſe by force and arbitrary conſtruction, offences into the crime and puniſhment of treaſon, which were never ſuſpected to be ſuch." In the early periods of Engliſh hiſtory, when the people were in total ignorance, and when the Judges were dependants on the king, there were ſome terrible examples of the evils of conſtruction.—But it never can be even ſuſpected to exiſt for a moment, in a government like ours, where the people know and are jealous of their rights; and where the laws are too apparent, to admit of the danger of any arbitrary ſort of conſtruction. I admit that any doctrine which opens a door to let in treaſon by inference or by analogy, which would lead to a dangerous conſtruction, ought to be avoided by every poſſible guard.——But that does not go to ſay that a Court, when the queſtion comes properly before them, is not to put a meaning upon our own Conſtitution, or infer what was the intentions of the framers of that inſtrument. It is the duty—it is the buſineſs of the Court, to ſay, what is the meaning of the words "levying war." And here permit me to obſerve, that the terms "levying war," are not ſo plain as ſome people imagine. To prove this I only need refer to the various ways in which they have been explained. Theſe words do not preſent to the mind, ſo diſtinct an idea of their meaning, as thoſe of "murdering a man," or "ſtealing a horſe." I will venture to aſſert, that if you were to go through this aſſemblage of people, and aſk them ſeverally, what was the meaning of the

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terms "levying war," some of them could not explain it—some would hesitate—and others would answer, but extremely variant. The consequence of this uncertainty of meaning, then is, that our courts must take it up; or rather would I say, have taken it up and decided by an adjudication—the highest in our country. They have declared what is the meaning of the words used in our constitution descriptive of treason, and I am persuaded that it will not be said, that by so doing they have established a constructive treason, or even opened the door for it ever to be introduced: but if justice be done to their adjudications, it must be acknowledged, that they have forever put that question at rest. Judge Peters has expressed himself upon this point of constructive Treason, in Fries's trial, p. 206. There was a time, (as he observes), when the Judges in England determined every thing to be treason which the king of that country wished to be called treason, in order that he might get rid of some obnoxious character. The Judges often declared the parties to be guilty of treason, when the crime, if any, pertained no more to treason, than it did to coining money. Cases, perhaps innocent in themselves, or had no relation to this crime, were determined treason, at the pleasure of the Court.

If the interference of the Supreme Court in pronouncing what is the legal meaning of "levying war," be a mode to establish constructive treason, the inference is, that the Judges have no right to give any opinion at all, as to the meaning of the Constitution. But, added to that, is a serious inconvenience; which is, that the meaning of our Constitution and laws would be uncertain; and so completely unsettled, as that no man would know what the law is! Every construction must rest on the extremely variant opinions of juries, if the Court were not to give the exposition of the law. The responsibility of acting right, or wrong, would rest on them, and there would not be a doubt, but frequently for the same crime precisely, a different judgement would be pronounced on subjects of the greatest importance.

If, however, none of these arguments are to be used in opposition to what I have advanced, it must be said, that the Supreme Court is erroneous in their judgment. I do not believe that the gentlemen will pretend to take this ground. But if they do undertake to shew that the opinion of the Court was incorrect, and that Treason cannot be committed in this country, until actual force is employed, and the object in forwardness to be obtained, the consequence will inevitably be, that our constitution will be a dead letter; and you put it into the power of every unprincipled and desperate man, who possessed the talents and hardihood, to overthrow your government whenever he should think it proper: because he will reserve his desperate effort, until he can accomplish his design, and when can brave the law.

But, perhaps, it might be said, that the decisions of the Su-

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preme Court is not underſtood by us. Upon this principle, I ſhould think it uſeleſs to attend to any reported judicial deciſions; becauſe my underſtanding is not ſufficiently enlarged, to comprehend their meaning. But, gentlemen, the words of the deciſion of the Supreme Court on this point, are as clearly and preciſely guarded againſt miſconſtruction, as it is poſſible they can be; for, they are peculiarly plain and diſtinct. If you examine them from one end to the other, and compare the ſentences together, you cannot diſcover the leaſt claſhing of ideas; but a plain, perſpicuous explanation throughout the whole.

I ſhall, therefore, take it for granted, that the law is as I have ſtated it to be; and that the overt act of Treaſon has been committed, if there was an aſſemblage of men, whoſe objects and deſigns were treaſonable: but it is the *intention* that makes the act treaſonable or innocent.

It appears, therefore, to be incumbent on me, firſt to ſhew, that there was a treaſonable *deſign* in the tranſaction you are now to examine.

Secondly: That there was an aſſemblage of men, for the purpoſe of effecting that object.

If we can prove to you, gentlemen of the jury, that the *deſign* of the priſoner was, not only to wage war againſt the Spaniſh provinces, with which nation we were at peace; but, preparatory to that deſign, and in order to carry it into execution, to take poſſeſſion of New-Orleans; and that his farther views extended to procure a ſeparation of the Weſtern from the Eaſtern ſtates, and thus to diſmember the Union, and eſtabliſh an independent government: then I ſhall expect that you will return a verdict of Guilty. This, from the evidence which will be produced to you, appears to have been the ſcheme of the accuſed. You will find that he meant to go down the river to take New-Orleans, under the profeſſion of going into the Spaniſh territory; by which profeſſion he would take advantage of the hoſtile diſpoſition of the Weſtern people to the Spaniards, and thus obtain their aſſiſtance.

But if the whole of this ſhall not be proved to your ſatisfaction, but either of theſe branches ſhould be proved—if it ſhould not appear that his attempt was to diſmember the Union, but that his intention was to ſeize on New-Orleans—that ſingle circumſtance, (an aſſemblage of men being alſo proved), effect his intention: then, according to the expoſition of the law, he would be guilty, although the object was far from being accompliſhed.

A ſcheme of this gigantic magnitude, if it remained unaccompliſhed, might be difficult to prove: for it would be abſurd to ſuppoſe that, while it was yet revolving in his mind, and only a commencement made towards its execution, he would communicate it to many perſons: but, in order to procure means of carrying it into effect, it would be neceſſary to diſcloſe it to a ſelect few. This he has done: he did diſcloſe it to a few men, in whom

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he thought he could confide. Probably he was miſtaken as to thoſe perſons; and, therefore, it is fortunate for our country, that we have it in our power to prove, by evidence the moſt authentic, (from his own communications), what he was about to do. Theſe, and numerous other circumſtances will prove concluſively to you, that we have a good foundation for our indictment.

For the purpoſe of eſtabliſhing an Empire in the Weſt, of which himſelf was to be the Chief, he made two viſits to that country. He proceeded into Kentucky and Teneſſee, and ultimately went down to New-Orleans. But it is obſervable that wherever he went, he ſpoke diſreſpectfully of the general government, the more effectually to facilitate the accompliſhment of his own deſigns. He repreſented the government as deſtitute of ſpirit to maintain our national honour; or, of reſolution to defend the country againſt the aggreſſions of our enemies. He uniformly ſaid, that there was no energy in the government, either at home or abroad. He ſtated to thoſe in whom he could confide, that all men of property and influence were extremely diſſatisfied with the meaſures of the adminiſtration; and endeavoured to make them more ſo, by declaring that they had not that influence in the country, to which their property and talents entitled them; and that in their national conſequence, they ſtood only upon a level with the great maſs of mankind—that with 500 men he could deprive the Preſident of the government, and ſend him to Monticello: that he could intimidate Congreſs, and take the government to himſelf: for the people of the United States had ſo little knowledge of their rights, or energy to prevent any ſuch meaſure, and were ſo deſtitute of ſpirit, that they would meanly and tamely acquieſce, and even aſſiſt in the execution of his ſcheme. Theſe were his expreſſions, and ſuch will be proved were his ideas of the government and people of this country, how abſurd ſoever it may appear. He ſpoke a different language to the people of the Weſtern States: He told them, that they were in a ſtate of colonial dependence upon the Atlantic ſtates: that they received no advantage or weight whatever in the Union: that they were abſolutely at the pleaſure of a people at a diſtance from them, whilſt they were annually paying millions to their ſupport, but received no actual benefit from it; becauſe it was to ſupport a government from whom they derived nothing in return. They were told that a ſeparation from theſe ſtates was neceſſary; and that a ſeparation would inevitably take place: not merely that it was neceſſary or likely to take place, but that it was actually fixed by a particular chain of events. "The ſeparation *will* take place, and be accompliſhed in leſs than two years," were his words. I thank God that his prediction has not yet been accompliſhed! And I hope that our lateſt poſterity will have reaſon to thank God that it has not been fulfilled before, or during their time!

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Such, gentlemen, was the language which the accused thought proper to use; although, whenever occasion required, he stated that his object was purely agricultural. Yet he took every suitable occasion to say every thing to the Western people which would tend to dissatisfy them, and prove the necessity of a separation: and, not satisfied with saying only, but the more effectually to foment discord, he entered into a correspondence by writing, preparatory to the execution of his plan, and we find one, who was expressly concerned with himself, using every effort by scattering publications for the purpose of inducing the people to disaffection.

To accomplish his plans, in the summer and fall of 1806 men were enlisted, actually enlisted; boats of a peculiar construction were built upon the waters of the Ohio; provisions to an enormous amount were purchased; arms and ammunition were laid in—all as if it was boldly avowed, in the face of the nation, that some hostile expedition was on foot, and actually progressing. Some of these men—about 40 in number, assembled with arms at Blannerhasset's island, in order to descend the river from that place. Mr. Burr himself was not there at the time of their departure; he had been there, and intended to have returned, but a messenger was sent off to him to warn him not to come back, as he would be in danger; as he certainly would have been. But the presence of a man is not absolutely necessary at the place of the treason: a man may levy war at a great distance from where he is at the moment: he may be even 3000 miles from the place where it is first discovered. Perhaps in a few months we may experience the possibility of this. The decision of the supreme Court has well established this principle "If war be actually levied, all those who perform any part, *however minute, or however remote from the scene of action*; and who are *actually* leagued in the general conspiracy, are to be considered as traitors." They are not the less *traitors* then on account of distance: the assemblage for this certain purpose, is the act of Treason, which we mean to rely on in supporting this indictment.

These troops on the island, seeing the neighbouring country alarmed, and apprehending that they would be attacked by the militia from Wood county, who, they had reason to fear, were after them, made a precipitate retreat in the middle of the night, with Blannerhasset at their head. They went down, with all possible exertion, to the mouth of Cumberland river, where they were joined by the prisoner and a small party. And there it was he took the command of the whole of them in person. By this time their numbers were increased to more than 100 men The whole of them, under their leader, then descended the Mississippi, and got as far, I think, as *Bayou Pierre*, not far from Natchez.

It was there, Gentlemen, that Burr first learned that all his schemes would be frustrated, by the vigilance and opposition of

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the commander in chief. He there found that his letter in cypher to Gen. Wilkinson had been communicated to the President of the U. S. and in the first moments of his surprize and disappointment, he acknowledged that very letter, complaining with astonishment and indignation to the persons who will witness this fact, that the commander in chief had frustrated all his schemes. Finding himself baffled, he entered into a capitulation with Cowles Meade (then acting as governor at Natchez,) by which he was bound to appear before a tribunal at Natchez, but escaped before the Court sat. On which he was arrested by Mr. Perkins, and brought here.

It will be recollected by you, gentlemen, that he professed to be engaged in forming a settlement at the Washita, on the red river. But we shall prove to you that he did not intend to make this settlement; but that it was merely a cover to the real design of the accused and his associates; and that the real intention was what I have before represented to you, tho' covered with the utmost mystery and circumspection, to the world at large, and to those whom they cared but little about this object of the land settlement was avowed. But to some, intimation was dropped of the great probability of an approaching rupture with Spain, to represent to them his intention, in case of such rupture to make an attack immediately upon the Spanish provinces—to some he talked about joining the U. States forces, to others he avowed his intention to proceed against them whether the government did or not. To a few gentlemen, and to a few only, the real design of the accused was communicated; But *all* of those that were with him, were told that there was a very great object in contemplation; that its nature was honourable and just, and known to the government of the U. States, and approved of: that it would lead to great riches and advantages. But the real object could not yet be known: it could not be developed at Blannerhasset's island, they must wait until they got to the mouth of Cumberland river. When they arrived there, some of the company, whose intentions were honest, were very anxious to know what they were going about, as they wished to do nothing but what was right and honourable in the sight of their country. But the scheme was not then to be unfolded, and these poor, undesigning men were tolled on, day after day, down the river, under the expectation of being gratified, altho they never were informed. At length, Burr was taken, and his men left to get to their several homes in the best way they could.

Chimerical as this project might appear, there was but one single thing wanting to accomplish it, viz. the co-operation of the commander in chief of the American army. If he had acted as some people represented him to have acted, it would justly have entitled him to the calumny and obloquy of the American people,—if instead of acting the part of a patriot, he had acted

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the part of a Traitor, what would have been the situation of this country at this moment? There would have been a civil war in the West. The people of those states, united as they are by interest, sentiment and blood, would have been involved in a war, of all evils most to be avoided—a war in their own bosoms, and against each other! whilst the Eastern ports of the U. States would have been assailed by an insulting and rapacious foe, stimulated by their knowledge of any divided and distracted situation, and particularly increased by the observation the prisoner so universally made, that our government had not energy enough to maintain internal peace.

But, Gentlemen, from this dreadful calamity we have been protected by the *integrity and patriotism of the commander in chief* of our army. I care not how this bold declaration may be received, but I do say, with perfect confidence, that I am speaking the truth; and that no man from the adoption of our Federal Constitution, who has had it in his power, has ever rendered greater services to his country than Gen. *Wilkinson* has done, by taking upon himself, with the order of his government, this right of counteracting and opposing such direful and disastrous schemes as were going on under the influence of the prisoner at the bar. And yet, for rendering these very essential services, no man can be more abused in a certain circle. He is as much maligned as though he had joined in the conspiracy, and had rendered it all his assistance!

It is not necessary for me, gentlemen, to anticipate the defence that will set up against these heavy charges; but it may be proper for me to trouble you with a relation of what has been already stated. The prisoner has stated, while under examination, that the object of this expedition was perfectly peaceable, and of an agricultural nature. If this ground is again taken, we shall be able to bring forward witnesses to prove the contrary. I had intended here, to have entered into an enumeration of the evidence, but I find myself too much exhausted to attempt it.

I have said, Gentlemen of the Jury, that I did expect you to enter into this examination with calmness, candour, faithfulness and impartiality, and I do hope also that you will enter into it with honesty, regarding the evidence that may be produced, and that only. You are to settle this case between the United States and Aaron Burr precisely upon the same principle and in the same way, as though it was the case of the most innocent man on earth, or as though it was the case of one of the most deluded of those that were concerned with him: or any other man in the community that should be placed before you. It is true that the prisoner has been in the exalted situation of vice president of the U. States, the second man in the government of our country, and the second man in the confidence of a majority of the community. He is a man possessed of talents and energy, which

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at the eventful crisis that appears to be approaching, might have been employed most honourably to himself and most usefully to his country. But these circumstances, instead of alleviating, are most aggravating to his case. His crime is greater in proportion to his information and circumstances. In other countries you will sometimes find such men, who from their elevated situation escape; but this does not comport with equal justice. In the history of England we read that of Lord George Gordon, the miserable fanatical wretch who produced a riot in London, escaped, whilst 17 or 19 of these poor deluded wretches who acted under his influence, paid the debt to the Law which was due to *his* crimes.

Gentlemen. I call upon you to view the accused in the same light in this country of justice and land of liberty, in the same light as you would any other man: to make no distinctions, to do justice, and to decide the case according to the evidence which will be brought before you.

Mr. Hay having concluded, Gen. Eaton was called into Court and sworn.

Mr. Burr rose, and hoped he should not be out of order when he enquired of the attorney what he meant to prove by this witness. If it related only to the conversation had at Washington he did not suppose that he ought to be introduced first.

Mr. Hay. We mean to prove what is contained in Mr. Eaton's deposition.

Mr. Burr. We shall object to this mode of conducting the prosecution, as extremely calculated to waste time; to destroy the proper medium of truth and to lead astray the Jury and the Court. We presume that the gentleman will be called upon first to prove that there has been an overt act committed. Then they may go on in their own order. There may be some end in view in proceeding thus, but Sir, there is something in the legal rule of evidence also. The testimony of this witness, if I understand it, has nothing to do with the indictment before the Court. We may be obliged to stay five weeks out of the six the gentleman supposes this trial will take, and after all, hearing what has no relevancy to the case. At this moment we think it proper to curb any irregularities which may appear. The gentlemen who are of my counsel will impress these things upon the Court more strongly.

Mr. Botts. The present subject is so apparent, Sir, that I shall not trouble the Court long in pressing the necessity of its interference. I should presume that, if the decision of the Court is to be respected at all, if I were to pretend to introduce evidence as irrelevant to the case as it now stands, as that of Gen. Eaton's is, I should be shortly called upon by the gentlemen on the other side to take my seat. And this measure would fully consist with the law of evidence. But, however, if the gentle-

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men do not acknowledge this point to have been already decided, it will be neceſſary for me to go on with the argument that has been before uſed, and conſequently increaſe the waſte of time which we have ſo much been experienced. We know that there has been a vaſt deal of war and noiſe in this Court, and a vaſt deal alſo in the public rumours, but we ſtill know that there has been no war *in fact*. Knowing this, and knowing that we ſhall be vainly and idly entertained with this, that, and the other ſtory, and that the Court, the Jury, the Counſel, and the Priſoner will be all kept from our homes in a very unpleaſant and oppreſſed ſituation, it is neceſſary to put a ſtop to all waſte of time, and be governed by the law, which gives to every accuſed perſon the rights of a fair and ſpeedy trial. In general I know it is not uſual to call upon the proſecutor to begin with his caſe at any particular part of it; and that for two reaſons: firſt, becauſe every proſecutor, learned in criminal laws, begins at the facts charged, which being proved, he can enlarge by other teſtimony. The other is, the fact itſelf is ſo known, and of ſuch a general nature, as that there can be no neceſſity for going ſpecifically to it. So in a caſe of murder, ſurely the homicide ought to be proved, before the accuſer ſhould go into other evidence, ſince it is very rare for murder to be committed without ſome clear homicide in proof. But, ſir, whenever a proſecutor, from inadvertency, want of experience, or what not, ſhould begin at the wrong end of the legal tale, and the proſecutor himſelf does not ſee cauſe to acquieſce, he has a right to aſk of the Court to inſtruct the Counſel for the proſecution in the order of their evidence.

I will ſuppoſe a caſe, to ſhew the order of evidence which ought to be adhered to. Suppoſe 1000 witneſſes were brought here from remote parts of the Union, to give evidence of the declarations of Col. Burr. The gentlemen acknowledge that this would not be received as evidence, except in the way of corroborative teſtimony, becauſe the Conſtitution itſelf bars the receiving of confeſſions except it be given in open Court: now, ſir, ſhould the time of the Court be waſted in receiving what would moſtly be corroborative of a fact which is not itſelf proved? It would be abſurd, and more particularly abſurd would it be, when that teſtimony related not to the caſe, or, if it even did, it was not to any act done within the diſtrict! To prove that the crime muſt firſt be eſtabliſhed, and then that corroborative teſtimony might be admitted, read Judge Iredell's opinion in Fries's trial, p. 174, 5, and that two witneſſes, of the confeſſion of the party in open Court, is neceſſary; ib. p. 171. In that trial we find that every witneſs is aſked direct as to his knowledge of the overt act. See for inſtance p. 37. If it were not ſo, the Court would be continually perplexed with argument about the admiſſibility of teſtimony. Gen. Eaton's teſtimony does not even relate to *acts* done *out* of the diſtrict: At any rate, it is obvious

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that the facts charged in the indictment ſhould be proved before any long rig ma role tale be impoſed upon the time of the Court and Jury. Now we know what this tale will be, becauſe all the world have ſeen it already; and, ſir, we know that it is perfectly immaterial to the caſe. Foſter, p. 246. Judge Patterſon in the trial of Smith and Ogden, p. 82, ſpoke upon the principle thus: "if there is no line, any thing and every thing may be given in evidence." Vol. 2d of Waſhington's reports, reaſon is given why immaterial evidence ſhould not be obtruded on the Jury. It is to avoid any thing that might *embarraſs* and *perplex* the Jury, when it can be of no manner of uſe. It is ſaid that no man ſhall be forced to come unprepared into a Court to account for all the actions of his life, and that merely becauſe it might be demanded of him, being brought there for one action charged.

I need no apology for theſe remarks, when the Court take a diſtant proſpect at what *might* be ſaid, or how much time might be conſumed, in the examination of 135 witneſſes on the part of the proſecution! I wiſh not to encourage a clamour within this Court, nor will I commend or reprove any perſon, but are you ſure that, from the ſtate in which you find the public mind, that, even if Col. Burr's plans were the moſt meritorious that any mortal can conceive: if they were calculated upon inevitable war, and only to be carried on in that event, the reſult of which remove the bonds of ſlavery from millions who are now groaning dreadfully under the yoke—that he would not have met with the ſame fate that *Waſhington* himſelf would have met with, if the glorious work of the revolution had failed, and are you ſure that if you were to permit teſtimony after teſtimony, witneſs after witneſs, perjury after perjury, to go on in communicating tales of things and circumſtances wide as the world—that all theſe things put together might prove the intention of the accuſed to be treaſonable—that you would prove the "overt act of levying war"? And this may be the reſult after all. This prejudiced, exaſperated country might not, at laſt, after all this long ſtring of events, think itſelf juſtifiable in taking the intention for the deed, however ſtrong the impreſſions may be.

Here are twelve gentlemen of intelligence and benevolence; they have been collected here to try this caſe, and yet they had the candour to acknowledge themſelves to be prejudiced: I am ſure, however, that even they would unanimouſly bear me out to ſay, that if no crime has been committed, they ought not to be troubled with the caſe. They will honeſtly ſay that nothing is a ſubject of their enquiry, until the overt act is proved; they will know it to be a mere waſte of time to go into teſtimony ſo far removed as is that of Gen. Eaton. What do we aſk? Is it any thing, ſir, that will embarraſs the proſecution? They cannot ſay that it would put them to the ſlighteſt inconvenience to begin

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with the main proof first. The proof of the act, if there ever was such a thing, is very distinct from the intention with which the act was done. The witnesses who knew the act, could be called up and their testimony separated from every other. I must insist upon the doctrine that the order of evidence is part of the evidence, and if the gentlemen do not admit of this, they must be driven to the alternative of proving the contrary.

What reason can they have for this unprecedented measure? I will not suppose that it is because it is the will of the Court. Can it be merely because they wish to have a tedious host of witnesses furnished to the Jury? I have too good an opinion of the gentlemen to suppose that such can be their reasons. But whatever may be the real motive, I trust and presume the Court will decide for itself, without the least regard to any thing but strict law and justice.

Now, Sir, if the practice of the Court and the law of evidence, if the convenience and natural reason of mankind all concur in pointing out the propriety of giving evidence on the main facts stated in the first place; and if no peculiar inconvenience will result from receiving it in that order, whilst a most manifest inconvenience would occur in receiving it in any other way, and in indulging what Foster justly calls *whim* and *caprice*—I trust that the Court will by no means indulge it.

Another authority I will read to furnish the same principle of justice as to the *order* of evidence, 1 East p. 96. He proves that the order is part of the Law of evidence; and that facts may be material and important in one stage of a prosecution, if the preliminary fact were stated, which, without them, would be unmeaning or inapplicable. In 3 Gilbert, 816, it is said "no evidence shall be given which is foreign to the issue;" the issue then must be first proved by direct testimony, and confirmatory testimony may be let in. I trust the Court will see the propriety of directing it to be so in this case.

Mr. MARTIN, for the consideration of the other side would point out a few cases respecting the treason of "levying war," to shew the exact similarity of proceeding in the trial with charges for murder, felony &c. The overt act must first be proved, and the intention must be made to appear from evidences which must arise out of the facts themselves, such as declarations &c. 5 state trials p. 17. 52 Vaughan's case. There were two counts charged: levying war against the King, and adhering to his enemies. He failed in a vessel with a French commission: this it would be found was first to be proved & then the corroborative testimony. So in 2 State trials 585 Messenger's case: there the fact was pulling down meeting houses; that being proved would let in other facts again. 8 State trials 219. 267. The *acts* first and then the *design*, was proved. Indeed common sense would point out the necessity of the fact being established before the

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quo animo, becauſe the latter would not be criminal in the eyes of the law without the former. Now what, in the preſent caſe, could be ſo juſt and reaſonable, as to proceed directly to prove that there was an aſſemblage of men on Blannerhaſſet's iſland, for ſome purpoſe or other; then if the quo animo appears treaſonable, the application can be made to the fact, as conſtituting a crime, according to the true meaning of the Law.

Mr. WIRT ſaid he had taken the liberty to predict that this caſe would take up ſix or eight weeks, and from the experience he had had, and the means which were uſing, he would leave gentlemen to ſay whether he had judged raſhly or not: But, ſaid he, they complain of our driving them into theſe meaſures. I muſt do the gentlemen the juſtice to ſay that they require very little driving, for they have metal enough, without requiring the application of whip or ſpur. We do not drive them; we only do what has been always done, from the firſt eſtabliſhment of judiciary rules—we bring forward our own evidence to ſupport our caſe in our own way: and I defy them to produce to this Court one ſingle example where the Court dictated to an attorney the order in which he ſhould introduce his witneſſes. Sir, I will pronounce that the Court cannot with conſiſtency, becauſe it cannot know what witneſſes he has to produce, or how he will open his caſe. We do not, however, deem it of vaſt importance to begin with the overt act; we have no motive upon the earth to adopt this courſe, except to ſhew to the Jury the whole of the teſtimony in the moſt diſtinct and luminous manner—to diſplay this conſpiracy from the birth to the conſummation; and ſtep by ſtep to trace the tranſaction. We want to commence at the birth of the grand ſcheme, if you want to tell a diſtinct ſtory, you muſt commence with its beginning. Surely, Sir, if a man was to write the revolutionary hiſtory of our country, he would not begin at the ſiege of York! would he not rather take the example of Homer, and tell us the origin of the event. We are not now in our playful ſtrains, but we are ſerious, and the reaſon we wiſh to commence with this witneſs, is becauſe it is the moſt *lucid* way that we can convey the tranſaction to the Jury.

But, Sir, there is another reaſon: I wiſh it to be done, becauſe, I wiſh to vindicate the attorney himſelf: I do not wiſh to ſee him arreſted in his progreſs at every ſtep merely to conform to what courſe the *priſoner* or his attorney ſhall point out. I ſhall ſhew you that in the Courts of Great Britain permiſſion has been given to the attorney, to invert the order of a narrative, although he was oppoſed by the counſel for the priſoner, (Hardy's caſe p. 81.) I do not quote this caſe for any other reaſon than to ſhew the independence of the attorney in the neceſſary mode of conducting his own teſtimony. It was attempted there to connect Mr. Hardy with the proceedings of the convention in Edinburg. The Court decided that theſe proceedings could not bear

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upon the prisoner until it was brought home to him by some other evidence; the other evidence was not to be let in until the attorney shewed the connection. What said the attorney? "I will shew that hereafter." The Judge replied, "that is enough." Such approbation was then given to the knowledge of the attorney, who said "I will hereafter make this act his own by other evidence," that he was permitted to take his own course, and this evidence was let in, under the knowledge that it could do no harm. Here then the rule in East read by Mr. Botts was directly perverted by a decision of the Court of King's bench. But here, when we declare that we can bring the treason home to Aaron Burr, we must be stopped at the very threshold of our evidence from taking that course which we say will do it most effectually; and every thing is to be thrown into confusion, and the intelligibility of the business be eclipsed, merely to gratify the prisoner and his counsel! If we are permitted to go on in our own way, Sir, we offer you nothing but what goes to the issue: we want to commence with the history of the affair, which displays something of the intention, and the course which it took until it arrived at the very act: we shall then shew the gist of that act, so far from attempting to prove any thing out of the issue, we are proceeding directly to it. We want to follow down the business by its own steps, but in this natural way of elucidation, we are stopt. And, what purpose can this early arrest answer?

Sir, I object to this arrest – because it implies an high disrespect to the attorney himself; it implies that he does not know his own evidence, but must be dictated to by the prisoner and his counsel. I object to be stopped, because we are proceeding in the luminous order of nature herself: it is her course to trace the fountain from its confluence to the ocean. And I object to it because the gentlemen cannot point out to you one single good effect that their mode will produce.

Now suppose that we fail in proving the overt act according to the opinion of the Court, could the Court possibly send the Jury out without evidence that applies to the issue, when the attorney declares that every circumstance gives a dark hue to the transaction? The Court knows that it is not in its power; that it cannot dictate the order of evidence, unless it be irrelevant to the issue. Suppose that we first prove the overt act, and then proceed to prove the design, can the Court stop us, and say that we shall not bring it forward, if it is competent and relative? We repeat it to be our wish to avoid all complicated and profuse testimony and to proceed in the most luminous manner. In Fries trial p. 174. 175. you have Judge Iredel pronouncing the very principle I contend for: he clearly declares that all the facts are to go to the Jury, and upon those facts they are to make up their judgment. We are not to be stopped; the whole

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evidence muſt go to the jury and upon the whole evidence we demand the verdict.

Mr. Botts quoted a paſſage from Judge Iredel to ſupport the propriety of proving the overt act, in priority of all other teſtimony. But recollect, Sir, the Judge was not contemplating the *orders* of the evidence. He was on the point of *ſumming up* to the Jury. Although it might ſeem indicative of the order of the teſtimony it was not, but only a collection of it together, to impreſs the Jury with the nature of the offence. It is evident that in this final charge he is inveſting no point whatever. And if it did refer to the point of order, even, there was the whole of the evidence before the Jury, ſo that whatever order might have been taken, there was nothing withheld.

They ſay we muſt produce evidence of the overt act—who is to be Judge upon that ſubject? Can the Court? If the Court is to ſtop us, then the Court decide upon the evidence, and this is the ſole province of the Jury. If we are not to be ſtopped by the Court, by whom are we to be ſtopt? Surely the priſoner will not preſume to do it. Sir, I do not think it is a part of your functions to decide upon the teſtimony, whether it may be applicable or not, but the *whole* of the caſe is to go to the Jury, that they may decide upon the whole.

Mr. Botts alſo read from Foſter 245 which appeared to me to have no reference to this ſubject at all. There were two overt acts laid in the indictment in Vaughan's caſe. Adhering to the King's enemies, and levying war againſt the King. There one overt act was permitted to be given in evidence on the charge for the other, becauſe it went to the intention with which the other act was committed. It is a ſound and deciſive principle of Law, that all evidence which does not bear upon the iſſue, ſhall be rejected. Now ſurely evidence of intention cannot be rejected on that ground, but, on the contrary, muſt be received, becauſe it is material to the iſſue. If, inſtead of proceeding to prove the intention of Aaron Burr by the way we were going on, we were to go to another overt act for our proof, we ſhould be right according to the Britiſh practice. But here, Sir, we are proceeding upon the ſame ſtory, and bringing the intention from a part of the ſame chain of action.

As to the caſes read by Mr. Martin, it is true that of the riot in London, the courſe of proceeding was as he ſtated. The order of that evidence was pointed out by the tranſaction itſelf, which was the act of a mob in pulling down houſes: there could be no neceſſity in ſuch a plain and known act, to go into the developement of deſign. The caſes quoted from the State trials are all the ſame, and were altogether diſtinct and different treaſons from this caſe, where it is important for us to follow the priſoner's actions in a cloſe line of events and preparation to get at Blannerhaſſet's iſland.

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I beg leave, sir, to advert to what you have said herein a previous examination of this case, because the gentleman has said, that you heretofore required proof of the overt act to come to your view in the first instance. And why did you do it? You wished that no such evidence had come before the public, lest it might generate an *ex parte* spirit in those who might hereafter have to judge the case. The Court was desirous of adopting that mode which would least tend to poison the public mind: and in that the Court was delicate, humane and correct. There was good reason for it. You then, sir, were Jury and Court combined: you had a right to decide upon the fact, and having such a right, you could say when there was evidence enough. But the facts are now no longer for your ear: the Jury is the tribunal *now* to decide upon the facts. With submission, sir, I would say, that you have now lost half your character and ability to say when we shall stop or when we shall go on with the evidence. All that you can now decide upon is, whether the evidence is or is not competent to the issue. I conclude that if the Court were to stop the course which the Attorney has assigned to himself to proceed in, it would break the lucid order of the story without the least possible advantage to the prisoner.

Sir, all that the Courts care about is, whether the testimony is relevant to the issue or not: and the practice of all the country warrants the mode for which we contend, and for which we beg leave to insist. Now, suppose there was to be an indictment for murder before one of the criminal Courts, and the Attorney of the Commonwealth was to begin the case by proving the prisoner's declaration of hostility and enmity to the party for six months before the murder was perpetrated, would the Court stop him and say, "you must prove the murder before you proceed upon any other part of the case?" No, sir, it would not. And I trust that the Court will not suffer the order of the narrative as about to be proved by the Attorney, to be deranged, when he must necessarily have matured his own course, and prepared his witnesses conformably thereto.

Mr. WICKHAM said he always considered that this was a question of very great importance in this trial, but he must confess that he had no idea that the importance would be attached to it which has appeared since he heard the counsel on the other side argue it, for if what they had arrogated to themselves was what they had a legal right to, it was in vain for Col. Burr to come before this Court under the least expectation of a fair trial, for it was the will of the Attorney to say whether a speedy period should be put to his life, or whether he should exist to the ordinary life of man: Because, instead of these five or six weeks which might close the whole business, they may add as many years to immure him under the constant hope of justice. If, however, he is to look to a termination of his case, he does not choose that the man-

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ner and the time ſhould be at the ſelection of his proſecutors : on which account aroſe the neceſſity of applying to the Court.

I have heard, ſir, ſaid Mr. W. this day, laws and mode produced and ſupported which I never before heard. I liſtened with much attention to the Counſel who opened the caſe, becauſe his manner was calm and temperate, and really merited attention; but the doctrines advanced concerning Treaſon was ſuch as in all the moderate days of Engliſh adjudication was never heard of under that monarchy. I rather ſuppoſe he called it Treaſon, becauſe he thought it to be ſo, but I can aſſure him, that he has been the firſt to denominate the crime to be what he ſaid it was. I had a hope that they would have led to the iſſue. With this view I was willing that he ſhould have gone on a little longer, becauſe it might lead to a ſpeedier cloſe. But my hopes and expectations of a cloſe to this buſineſs are vain, if the proſecutor is to take his courſe; we are to continue in one unintereſting ſcene forever, and flatter ourſelves with a termination in vain:—and merely becauſe theſe gentlemen ſay that they are proceeding in the moſt lucid way! The way of proceeding ought not to occupy a ſingle moment. I will venture to ſay that if we were to take the right and equitable courſe, the whole caſe would not occupy three days of the time of the Court.

The ſaving of time, ſir, is an object of immenſe importance. What are rules of evidence introduced for? For the procurement of truth according to certain definite principles *and for the ſaving of time.* For preventing every thing which has not bearing upon the caſe, and no relation at all to the ſubject; and for ruling what ſhould and what ſhould not be given in evidence. And why? Becauſe the evidence would prejudice the Jury? No, ſir; but becauſe it would waſte their time and the time of the Court. What is the rule? That no man ſhall be at liberty to introduce teſtimony, except that teſtimony goes to the matter in iſſue: or if it does not immediately go ſo, then there muſt be introductory teſtimony that ſhall ſhow it to go to the matter in iſſue. Introductory teſtimony may give it a bearing on the caſe, but if it has no bearing it is expelled. But the principal queſtion is, Has ſuch introductory teſtimony been adduced? The order of teſtimony is a part of the Law of Evidence; and if a man does not conform to that rule of order, he cannot produce his teſtimony, for he ſhall not be at liberty to waſte time.

But the order of evidence is not to be regarded by the attorney: he ſtands on higher ground, as a public officer, and he is not to be governed by the Court, but the Court is to be governed by him! And where does this ſpecial privilege ſpring from? Is this pre-eminence applicable to him alone, or are thoſe gentlemen who are with him to participate in this exalted privilege? Sir, he ſtands on no higher ground than the priſoner at the bar, or than myſelf: the ſame rules of evidence applies to the one as applies to

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the other. But does he not contend for certain benefits and advantages belonging to the profecutor, referring to the crown profecutor of England, and applies them to the commonwealth here which do not belong to the counfel for the prifoner? I underftand him to contend for it.

Mr. WIRT. I do not contend for any fuch thing. I contend, fir, for no peculiar rights to the profecutors of England or this country. All the rights I contend for in that officer are attached to his *knowledge* of the cafe, and his confequent right to decide for himfelf where to begin with his own teftimony, and how he fhall conduct it, without being dictated to by any one. The fame right alfo belongs to the prifoner's counfel as to their teftimony: for each refults from their own knowledge of the fact: which can be depofited alone in them refpectively.

Mr. WICKHAM. The miftake was a very natural one, if I was miftaken: becaufe the gentleman did refer to the crown of England, and he did plead for this fpecial privilege, which he has now pared down. But will the gentleman have the hardihood to fay that there is no courfe between two extremes in which a man is not forced to fteer in the order of his evidence? And if there is fuch a courfe, if it is the rule for the plaintiff, it is for the defendant. Now fuppofe a man was fued for a juft debt, fhall he be permitted to continue the cafe term after term becaufe he introduces teftimony upon teftimony which has no bearing at all upon the cafe? No, fir, he fhall anfwer to the event, if he does not come to the point at iffue, and every evidence that bears on that iffue, and that only will be received. Now here the point at iffue is a crime charged to have been committed on Blannerhaffet's ifland, but the gentleman fays that any circumftances which relate to the *intention* are admiffible in the firft inftance. Sir, is *intention* punifhable? No; the gentleman admits it is not. Is intention conceived on Blannerhaffet's ifland three years ago to be taken? No, fir, the enquiry whether the intention at the time ftated was to commit Treafon. The Court may have its time deftroyed by a number of ftories and converfations; but, could thefe kind of things have any poffible bearing, 'till the overt act was proved and connected with intention? I remember that when the feveral jurors were queftioned, they were afked whether they were of opinion that Col. Burr continued in his unfavourable intentions to the time ftated in the indictment. This, then, is the point to which all intention muft be brought, becaufe there and then the act is charged to have been done. Now, I do not think that the profecutor means to fay that Gen. Eaton can prove what was the intention of my client at the time the treafon is charged.

But this is the "moft lucid and diftinct method of conducting the profecution." Now even fuppofing the gentleman to have not the leaft bias upon his mind, yet the Court fhould in this, as in

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all cases, lay down rules of law for the government of this prosecution and defence. The gentleman is very fond of "lucid" order I know, but even his means, perhaps, may not be the best to obtain the end. Perhaps he himself may not be the best judge of the best order. That method might suit him best, but it might not suit us best, nor might it best suit the merits of the case. I hope he will not presume to take our privilege from us to judge upon that point.

We are told, sir, that the order of time will make this a preferable mode of introducing the testimony; that to invert the order of time will confuse the subject. Now can it be supposed that the [illegible] any 12 men, who should find the treason to have been committed, and who should afterwards prove the intention, who could not so arrange the time and intention as to apply it to the treason? Can they be so full of circumstances which would so forcibly demand their attention

But the attorney is to do as he pleases, was determined so in the trial of Hardy. Now no argument can be more unfortunate for the attorney than this reference, because it directly against him. What was there proven? Why, was a communication between Hardy and the Edinburgh convention, by a paper that was found in his possession. Here is the connexion proved by this letter; and he was proved to be the secretary to the London society of Correspondence. After this he goes on to shew the intentions of the Scotch deputies. Is that the case here sir? No. Here the proof of the conspiracy has not come first forward, as it was proven there. If he had gone on to prove the intention first, he would have been stopped.

But they have the greatest knowledge of the circumstances, and the Court can repress irrelevant testimony. I join issue with them as to their knowledge of what they have seen, and as to the power of the Court, but not in their inferences and conclusions. They are not to go on as they please, how much soever they may know of what their witnesses can prove: this Court, sir, not only has a right to stop them, but it is a bounden duty in the Court so to do. But suppose the overt act be not proved by one man, are not the Jury to judge? Yes, they are. Suppose that neither Col. Burr, nor any one connected with him, had ever been in Virginia; is not the Attorney to be stopped upon all his premises that could go to attach the crime to him? What do we say? Prove your overt act first, and the Court is bound to give your testimony to the Jury. As soon as the act is proved, then the motives may be produced.

Judge Iredell is of opinion, Fries's trial, p. 174—175, was referred to. Now if I understand, (and I certainly have no right to arrogate to myself a greater share of understanding than the gentleman), I think it proves a direct contrary doctrine from the application which was made of it. And Mr. Lewis's question

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clearly corroborates that impreſſion that the proſecutor cannot go out of the county laid in the indictment to prove the intention: you are confined to the very ſpot until you have proved the overt act by two witneſſes in the ſame county; and then evidence may be drawn from other counties; and "the competency of that evidence is for the Court to decide, but the Jury muſt eſtimate its weight." This is an undeniable doctrine, and which does not derogate from the powers of either Court or Jury. I do not ſay that it muſt be proved to the ſatisfaction of the Jury before it is committed to their conſideration; but I will ſay that the teſtimony, whatever it may be, muſt relate to the overt act: and if the Court ſhould ſay that it is no teſtimony of that nature, it can prove no farther. Now ſuppoſe an Attorney ſhould pretend to ſay to an overt act by a ſingle witneſs, the Court has? If he anſwers, him, "have you no more witneſſes to the Court, upon ſuch a caſe? "No ſir;" what will be the duty after examination, becauſe the Why undoubtedly to ſtop the witneſſes to the overt act. No teſtimo- Conſtitution requires the intention, becauſe he has failed in the ny can be let in upon this ground it is that the order of evidence main point, becauſe the jury ſhall not be troubled with illegal is irrelevant teſtimony, which would inevitably be obtruded, but for the watchful medium of a Court. Thus it is in a caſe of demurrer in a civil ſuit where all the evidence that has been heard muſt be admitted as fact, before the demurrer can be heard. Admitting the whole to be true, the queſtion is as to its relevancy to the caſe, and upon its legal applicability or ſufficiency it is that the Court, and not the Jury, decide.

The argument relative to the Engliſh application of the overt act might have merited conſideration, but the gentleman has been ſo good as to anſwer it himſelf: he admitted the Engliſh doctrine to be founded on the Common Law. But what is the Common Law rule? Why, that an overt act committed in one county, but not charged in the indictment, ſhould not be given in evidence until you have proved the overt act as laid in the indictment. And why? It is not becauſe it is an overt act merely that it is inadmiſſible, but it is becauſe the rules ſay you ſhall not go out of the county to prove by any act which does not bear upon the queſtion, any act done in a county. Now we all know what Gen. Eaton has ſaid, and, without any extraordinary gift of prophecy, we may conjecture what he will ſay again. But where are the collateral circumſtances to be proved from, even allowing that Col. Burr did ſay all theſe viſionary things to him which he has before ſworn to? Who can come forward and ſay that he did theſe things, or took any meaſures towards them? But if all the talk of Mr. Burr's did occur to Mr. Eaton, where did it occur? At the city of Waſhington. And this, ſir, is a ſtrong legal objection to its being heard in evidence here at all, becauſe it

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relates not at all to the case laid in the indictment. We say to the attorney, first lay your foundation, and then you may support it by Buttresses, and other enclosures. This is the sound immoveable principle of law and decision upon the subject.

The gentleman says this is a different case from that of Damaree and Purchase, because this is not the case of a mob, and in arms and array. Admitted. But how are we to know the distinction until we can hear the proof? We want the overt act to come out that we may be able to observe what it consists in. But it seems we must take it from what the gentleman or his indictment say it is.

But he says the Court have decided in this way. When he says this, if I understand his argument, it incontrovertibly proves our position, because it was where the Court had the whole testimony to judge upon by itself, and was not bound to pursue strict order. But when the Jury are to judge can it be admitted also? No, Sir. What does your Court say as to testimony? "We may be trusted, because we are not liable to receive impressions from what may be irrelevant, if let in." But can it be said so by a jury? And if the Court thought proper, at that time to permit it before themselves without regard to the order, will, the gentleman say, *a forcion*, that it will be admissible without regard to order or controul, before a Jury.

Another argument was that the Court did not wish the whole matter to come out. Sir, I know that the Court are not desirous that the opinion of the Jury should be forestalled. But did not the Court express the law upon the subject? and what did the counsel say? That however he might deplore the opinion, it was his duty to submit to it.

But at length the gentleman draws a conclusive point to view. The Court upon all occasions allows the attorney to do as he pleases, because he best knows the course his evidence ought to take! Why, Sir, I will not presume to draw comparisons; I will not however allow that he is more infallible, or less liable to prejudice than we are. If I may judge by his actions, I must say that he has followed up this prosecution with a zeal and avidity which scarcely can be excuseable in a gentleman placed as he is, for he has used his every effort to procure a conviction. Be it so, Sir, that he is right in this, but we must claim the interference of the Court in behalf of our client to arrest all improper testimony. Has the point ever been disputed? Has it not always been the rule for the attorney to prove the fact first, before any thing is heard about the intention.

The case of a murder is brought forward, and the gentleman calmly asks whether he might not go on day after day and week after week stating cases which are not relevant, and after all be at liberty to stop short of murder.

Mr. WIRT.—This would be an absurdity: the gentleman has

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not taken my position, and he cannot be permitted to assume my attitude in this incorrect way. It is making a proposition for me which I never propounded. My proposition was that there was no case, in my knowledge of the Court saying "prove the act of killing before you go farther." I did not, as Mr. Wickham states, contend that it was law to go on with the intention day after day and week after week, stop short, and never prove the murder. This is like many of his representations of our argument.

Mr. WICKHAM. I understood the gentleman precisely, and I stated his proposition correctly, though in different language. Although it might not be in my power to make use of that elegant and flowery stile which his superior talents enables him to, yet I assay to state his proposition in my own plain language. And what is it? Why that in an indictment for murder, they would be at liberty to go into collateral testimony: but, Sir, have they a right to go into the prior transaction of the life of a person to prove any, and every thing, to prove that it was *probable* that he committed the murder? This was his proposition, absurd as it may appear. I then took the liberty to suppose that if you could spend hours in this sort of examination, prior to enquiring into the fact, you might use weeks in the same way. This is an inference which is necessarily drawn from the proposition. But, I say that he is not at liberty to do it. And why, Sir? Here is a case of murder, and the attorney takes this extremely broad range for days or weeks for aught I know, and after all he is called upon to prove the murder! Now suppose he cannot do it, is he not obliged to stop short? What is he to do, if after all his researches, he cannot get the proof of the act? after spending this enormous waste of the time of the Court, perhaps the man himself walks into the Court as well as ever he was in his life, and behold, no murder has been committed! Now, Sir, compare this with the present case of Treason. We aver that there has been no treason committed, and that it is out of the power of the gentlemen combined, to prove that there has been? What, must they be permitted to go on consuming time to prove nothing? No, Sir, they must stop short if they cannot prove the treason. It is precisely the same as it would be in the murder adduced, because all the intention in the world will not constitute the act. Gentlemen mistake me if they suppose that I mean the least misrepresentation of their arguments: but I do wish to show that they end in the most glaring absurdity.

The only argument that has the least semblance of plausibility was this: that the very nature of an overt act of treason, implied a treasonable intention in the commission. But what time, Sir, is this intention to be applied to the act? Why, Sir, to time when this armed and arrayed body of men met to oppose and resist the government of the U. States at Blannerhasset's island.

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Here then we call upon the gentlemen to ſhew their treaſon. Now ſuppoſe Col. Burr ſhould have conceived all thoſe things at a prior time about Mr. Jefferſon and about the government which have been aſcribed to him, what would it amount to? Now I agree that if you prove the overt act, you may take ſuch teſtimony as to the intention; but I aſk ſober reaſon to ſay what would this tale be of itſelf? Prove the act, and then, if the contrary be not ſhewn, theſe circumſtances will have weight. But how far would they carry this ſort of teſtimony; we know not where they would ſtop, but we are perſuaded they muſt ſtop ſhort of an overt act, becauſe there never was one committed.

We are told by Gen. Eaton that Mr. Burr ſpoke diſreſpectfully of the general government: of its incapacity, timidity and want of energy: Now I well remember the time that gentlemen of their political tenets talked very much of Mr. Adams's adminiſtration, and of the rigours that were then purſued, by which ſuch a crime as that ſaid to have been commited in the hearing of Mr. Eaton could have been cognizable under the Sedition act, as it was called. Now ſuppoſe one of theſe gentlemen for making too free with public characters had been carried from this, their place of reſidence to the country famed for "ſteady habits" (Connecticut) after he is hurried away there, by ſome means or other, for trial, he is kept week after week before a Court called upon to meet the actions of his whole life: how and what he was at one time and at another place. Now, Sir, I aſk whether that gentleman would not have demanded a proof of the act for which he was brought there, or whether he would have been ſatisfied to hear it ſaid that the proſecutor was proving his intention; he would ſometime hence prove the act.

The authorities produced by Mr. Botts and Mr. Martin, are, I think, moſt concluſively ſtrong. Until you procure your evidence on your main point, the overt act, you are not to be at liberty to go on with any collateral circumſtances. I truſt, Sir, that the Court will ſee the propriety and legal force of theſe arguments, and direct the order of the teſtimony at this time to be given under this eſtabliſhed rule.

Now, Sir, what becomes of the doctrine contended for by theſe gentlemen? Now ſuppoſe they ſhould prove an overt act elſewhere, (if we could ſuppoſe ſuch a thing) is it not the province of the Court to decide, and inform the Jury that not having been within the diſtrict, it is not within their province to enquire about: for *every thing* relating to the law and order of evidence is to go under the direction of the Court before the Jury. If the gentlemen fail in the overt act charged in the indictment, then there is an end of the caſe at once: if they give the teſtimony to the Jury, credible or incredible, the weight of it will reſt with the Jury and not with the Court.

Mr. WIRT ſaid he roſe merely to make a ſhort reply to Mr.

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Botts, who had ſaid that this Court had the power of deciding where there were two witneſſes or not produced to the ſame overt act; and that if the Court were not ſatisfied with the proof themſelves, they had the power to ſay to the proſecutor, "you can go no farther." Now, if this is law, what becomes of Judge Iredell's opinion, that the *whole* evidence ſhall go before the Jury? Does not this preclusion derogate from the rights of the Jury? So with reſpect to the evidence on other Counts in the ſame indictment, ſhould the Court ſtop the proſecutor in his examination? The Court can do no ſuch thing—the Court, after the evidence is gone through compleatly on both ſides, can then ſtate the law of the caſe and apply it to the evidence. If the contrary doctrine was a truth, the ſacred and valuable right of trial by Jury would not be worth a cent in this country, becauſe the Court would have the perpetual controul.

Mr. WICKHAM. If I were underſtood, I ſaid that the Court were to judge of the competency of the evidence: after it is proved (no matter by whom) that ſuch and ſuch *acts were done*, the Court then let in the teſtimony: but if there is no teſtimony to prove thoſe *acts*, are not the Court to ſay that there is no teſtimony?

Mr. CHARLES LEE. May it pleaſe your honours.

At this late hour, I riſe to offer a few obſervations on the queſtion which has now been diſcuſſed, which is one that I really did not expect would have been carried into ſuch an idea of conſequence, as it has been made to aſſume: but after hearing the doctrines which I have heard advanced on the preſent occaſion, it appears to me eſſential that a ſolemn deciſion ſhould be given upon the doubt of the queſtion. I ſay the *doubt*, becauſe the doctrine of the Court powers is diſputed, and I cannot think it to be beyond a queſtion of doubt.

The firſt doubt which appeared to receive weight in the preſent diſcuſſion, was, whether a Court of Juſtice has power to controul the proceedings of the advocates at the bar in the trial of the cauſe, in a capital caſe. Whether it is certainly and ſeriouſly diſputed that this power does exiſt in a Court of Juſtice I know not: but certainly the gentlemen muſt know that parties and advocates are to act under the *diſcretion* of the Court. *I ſay diſcretion*, becauſe whenever I addreſs a Court on a ſubject of this deſcription, I addreſs as a body poſſeſſing ſound diſcretion, for with the Court it is a matter which the oath and integrity of office firmly dictate to, and it muſt regulate alone, whether it be in civil or in criminal caſes. The parties have not the power to arrogate any courſe to themſelves before your honours. I truſt then, that it has been merely mentioned as a *doubt* whether this Court has the right to controul, in the order of evidence, or not. The power of the Court muſt be admitted, beyond the poſſibility of an argument. And certainly it does be-

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long to the due and certain administration of justice, that they should order every thing that relates to the full and compleat developement of every fact before the jury, upon that found discretion which they possess. If an advocate will offer to do what *justice* says is wrong, and what *common sense* says is wrong; (for I will not offend to go to the book, when that fundamental rule of the common sense of mankind will support me) if I am held out those unerring principles, it surely is enough to satisfy every one who has had merely a doubt excited upon the subject, that the Court have a right to regulate the proceedings of advocates with regard to testimony. I will then suppose it conceded that your honours have the power.

The next question is, how ought that power to be exercised on the present case? How do the rights of mankind coincide in any particular rule laid down? I will admit with the gentleman, that in this country there is a great deal done by way of practice; and that many things are done *sub silentio*, and merely by practice without any specified rule: but loose practice forms no guide to a sure decision, and ought not to be admitted in a capital case. When therefore the party is arrived before a tribunal upon the solemn charge of treason, he ought to know the precise channel through which his crime is charged. I say, sir, that he comes to answer that, and that only which is stated in his indictment, and in that way that strict and unerring justice has pointed out. For when a party comes here to answer high treason, does he come here prepared to answer for all the transactions of his life; in every period (perhaps for years back)—in every conversation, some of them of a private and confidential nature—in every political contest, perhaps at an election, when his feeling and principles were warmed beyond temperature? Is his whole life and conduct to be laid open, because it is pretended he is chargeable with high crimes? And shall an Attorney be allowed uncontrouledly to go into any year, any place, any transaction, to prove—what? Not any thing special, but under pretence that there has been some political crime, at some time or place, which he is charged with committing, and for which he is brought here! I say, sir, that humanity and justice forbid it in any case, but much more so in a case like the present. When I speak of the case now before the Court, I have the impression always fully in my view, that we have to face an indictment charging high treason. And shall I, for a moment be charged with too great zeal, when my client is charged with high treason! Since that is the crime charged we shall not be denied of the use of every lawful means of vindication or refutation.

What is High Treason? It consists, with submission to your honours, in *an open deed of war*; and also in an intention to subvert the lawful powers of the government: or, in other words, it consists in *an open deed of war, to subvert the sovereign power of*

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the country. To form the constituent parts of treason, both these must be proven, if the treason charged is of that species expressed in the Constitution by "levying war." But there may be an intention to subvert the government without the commission of treason, because treason consists of act as well as intention, and in *open* act, I therefore say, that there may be crimes, (and wicked ones too) perpetrated against the government, which the law of treason will not take notice of, but when I mention these crimes, I wish to pass over the words "overt act," because they are not of that open public nature which the law requires to constitute the crime of treason. When I mention this distinction, I wish the country at large to understand me, because, if the doctrines which I have heard advanced this day are true, there is no man knows when he shall not be arraigned for the crime of treason. I say, sir, that I understand treason to consist in an open deed of war.

But there must be an intention of *heart* to subvert the sovereign power. When I enquire therefore as to the order in which evidence ought to be given in a case of Treason, common sense and common justice tell me that the first enquiry necessary to be made should be, "has there been an open deed of war committed"? Now sir, mankind is a finite creature, he can examine into what his organic system admits of, and what are visible acts; but whoever among us shall pretend to examine into the heart will find that he is not infinite; and discover his incopetency to the office.

Any open deed of war then, in common sense, is the first thing to be enquired about, in relation to treason. Conversation may deceive and illude the most observant, and so may actions, as to the specific nature or species of crime in a legal sense. Therefore it is the duty of a Jury when they have an indictment for Treason before them, to enquire whether the technical meaning is attached to the act—whether this open deed of war has been committed: for unless this is proved, all their efforts are founded in conjecture, and their results will be conjecture, whatever gentlemen may represent to have been committed; and it will tend to deceive and delude the Jury, and make them believe those acts to have been deeds of war, if the "lucid" doctrine which has been laid down, shall not undergo a more strict examination.

The open deed of war, sirs, is what every body can judge of. Can there be any doubt then upon the question of natural justice? Certainly natural justice must decide that until the open deed of war is proved, there needs not, nor can any evidence be admitted as to the intention of any person who may be said to be connected. An open deed of war is certainly an act which may be *felt*, *seen*, and *heard:* it must be brought home to our senses. The Jury, when they have the evidence with respect to that fact, will be able to ascertain whether it has existed or not, but they

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are not to be troubled with converſations which were uſed to try the romantic ideas of an individual, or to diſcover the way of thinking of another, or to know the character of another! This would throw the caſe into an immenſe uncertainty; and I am perſuaded that, from the conſequences which muſt inevitably follow, all ſuch evidence will be ſhut out. And what will be the conſequence? Why, no evidence will be ſhut out but what is irrelevant or incompetent to prove the iſſue. And who is to decide upon this relevancy or competency? Moſt aſſuredly and undoubtedly the Court muſt decide. Now ſuppoſe a man was to be indicted here for Arſon, or burning a houſe: it was attempted to be proved, that he left Boſton to come here with an intent to burn that houſe. but he was to anſwer, "Why the houſe is ſtill ſtanding: it is not burnt." Would the Court pay any attention to the ſuppoſed intention of the party to commit the crime which had never been commited, nor, perhaps, any attempt made to commit it?

It may be ſaid, perhaps, that the Attorney's opinion on the ſubject of teſtimony ought to be reſpected. And ſo I ſay it ought, but only to a certain degree: but not to that degree as to believe what that officer ſhould ſay was intended to be done, when it was not done at all. It would be improper to receive evidence of the nature of intention, when the act is not proved to have been committed.

Sir, we are aware that there never has been open deed of war committed by any perſon or perſons whatever, but more eſpecially by the priſoner: and when the Court are told that this is our defence, what are your honours to do between the contending advocates? Muſt you not ſay, "ſatisfy us that the fact has been committed, and then we will do you juſtice." But it is in vain for you to ſay that you will connect this buſineſs with the Treaſon, when you are called upon to prove the facts. Why ſhould we not now hear the facts as to the Treaſon, and afterwards, thoſe which relate to intention? Now, is there any ſort of reaſon to be given why the proſecutor ſhould be indulged in his belief that he can prove, what he ſuppoſes, will amount to an open act of war? *Open*, I ſay, becauſe it is to be known—it is to be underſtood by all men—it is not to be left to a man's mind—all metamorphoſes are to be excluded—all deductions of fine traits of treaſon are to be excluded. It is to be open to the ſenſes of every man in our land. The ſame reaſon will ſatisfy the poor, the learned and the ignorant, that the act of war has been committed. This is the bound which our Conſtitution has placed upon the "overt act of levying war." And if our Conſtitution has not preſcribed its limits within narrower bounds, ſhall the Attorney be permitted to do it? No, ſir, the officers of juſtice are herein limited, becauſe the number of treaſons ſhall not be

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increaſed: and it is bounded within thoſe limits becauſe they ſhall not be decreaſed. They cannot be made fewer, nor more.

Now the treaſon which we find laid down in our Conſtitution takes for its foundation, WAR. If I was ſuffered to make uſe of the expreſſion *war* according to Philoſophical principles, I would ſay that *war is the element of treaſon*. Now, according to the doctrine of conſequences, if there be no *War* in America, there can be no *Treaſon*. What is the logical meaning of *War?* It is a conflict, by open force, between one ſovereign nation and another; or between one party, of the ſame nation, and another party. The one is called a *public* or general war, and the other is called a *civil* war. Now, ſirs, when our Conſtitution is ſo guarded as to ſay that there ſhall be no treaſon except there be a war; and that no man that ſhall be charged with Treaſon againſt the United States by levying war, ſhall be adjudged guilty, without there be an "overt act, (an open act or deed) of war committed, and that this *act* ſhall be proved by two witneſſes to have been committed by him, what can we ſay? Why we muſt ſay that common ſenſe can prove the Treaſon, if there be any treaſon committed.

This, of all crimes, is the moſt unneceſſary to prove the intention in, if the open war be not ſhown firſt. It is ſo eaſy to prove a war. Public and general commotion and *hard knocks* will always ſpeak for themſelves when there is a war. And, ſir, when the external evidences are ſo clear, why ſhould it be requiſite to deſcend into converſations and private movements, and extort from every circumſtance and connection whatever may favor the indictment, unleſs it be in an after ſtage, when the point of *war* is proved?

I ſhould truſt, may it pleaſe your honours, that before you will agree to ſuch doctrines, you will well know that it is abſolutely neceſſary for the purpoſes of a *fair trial*, for that is the great object. It is not any thing elſe but the true adminiſtration of juſtice that this Court is to view, and that without the leaſt favour, affection, or influence: without fear or apprehenſion. But let not the proſecution deviate from this courſe. After they have proven the overt act, if they have any evidence that will go ſo far, then let them go into collateral teſtimony, but collateral evidence is not to be adduced before the principal facts and above all the intentions of the heart are the moſt difficult to come to any knowledge of, and ought not to be enquired into until the war is proved. Show us the open deed of war, and whatever your evidence be upon that ſubject, be it much or little, let us know what you rely upon. As to what may be eſſential to conſtitute high treaſon, we can diſcuſs that hereafter. But in the mean time, let us not wander throughout America, and not be limited by fact, by time nor by place to know what will never make us the wiſer as to the real ſtate of the caſe as ſtated in the indictment. This

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looſeneſs, this irrelevancy never can be permitted by the Court, for I humbly truſt that the Court will not merely hear evidence on the ſubject of Treaſon generally, but of the Treaſon which is ſpecified in the indictment; for it is that alone which we are prepared to anſwer, even if there were more committed. And how are we to come at that even, without we hear the facts ſtated which relate to it, unentangled by other circumſtances of an extraneous nature?

The place and time ſtated in the indictment relates to a treaſon committed on Blannerhaſſet's iſland in December, 1806. This is the time and place of which we want to hear the teſtimony. And ſhall it be pretended that this is not the province of this Court to confine the teſtimony to the time, place and circumſtances ſtated in the indictment? Sir, let us not put the cart before the horſe, but take the natural courſe of the events, and then, if they pleaſe, we will hear the intention.

We all have our feelings. Reputation to us is dearer than life. And will the Court juſtify a courſe of proceeding in which a man's deareſt reputation ſhall be aſſailed, when, after all the moſt ſcrutinous examination of his adverſaries, there ſhall not appear a tittle of teſtimony to juſtify any examination into his conduct? The proſecutor is certainly poſſeſſed with all the power which he can ever have: he has his witneſſes at hand; he knows what they can prove: he has his own time to adduce every thing which is in his power: he has the jury in their box, and he has the priſoner at the bar. What can he want? What time or circumſtances can be more favourable to him? He has all the advantages which he could deſire, and far greater than I have been accuſtomed to ſee. I muſt own that the bar in the Court where I have lately practiſed, is kept in much greater ſubordination. The Judges will there ſay, "let the witneſſes ſtand by: let us ſee the nature of the caſe, and then let them be produced, according to the rules of evidence." Now this can be no harm, but muſt inevitably facilitate caſes which the bar would otherwiſe extend *ad libitum*. They may be proceeding very properly in themſelves, but yet the Court conſider themſelves bound by the reſtrictions of their province to decide how the gentlemen ſhall proceed. Sir, we caſt ourſelves upon the Court: we depend upon them to do us juſtice in the order which the evidence may be produced, and hope that we ſhall not be forced to wade through a whirlwind of duſt to know whether there has been a crime committed, or whether there has been no crime.

Mr. MARTIN. I ſhall take the liberty, may it pleaſe your honours, to trouble the Court with a few obſervations, not in fact that the ſubject requires it, becauſe, it is ſo plain as not to be miſtaken; but in order to throw a little more light on ſome parts of it.

It has been admitted by all, that, in order to find a perſon guilty of treaſon, the overt act muſt be proved. No act of vio-

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lence or warfare can be levying war againſt the U. States, unleſs thoſe acts ſhall have in view a diſſeverment of the union, or be otherwiſe aimed at the government of the U. States. It is admitted that ſome of theſe things muſt be proved in order to find the indictment. But the queſtion is, which is the legal way of proceeding, to eſtabliſh theſe facts to the Jury. One ingenious gentleman admits that it is not of much conſequence in which order the facts are to go, but yet he very tenaciouſly argues for his principle in oppoſition to our opinion of what is the legal mode of doing for two reaſons: one is becauſe he conceives the way that they wiſh to introduce is right. The other is, becauſe to deviate from their mode, would be a mark of diſreſpect to the attorney, who has choſen his own way to produce his witneſſes. Now, I am ſure, Sir, that the ſame ſentiment pervades the boſom of every gentleman with whom I have the honour to be concerned, which I have myſelf on that ſubject: that it is far from our intention or wiſh to ſhow the leaſt diſreſpect to that gentleman: on the contrary, although I ſhall contend with all the powers that I poſſeſs, that he is totally in the wrong, I declare that, if he goes on with the ſame gentleneſs of manners and propriety of conduct which he has diſplayed this day, throughout the whole trial, he ſhall receive my warmeſt reſpect. I am very glad alſo, Sir, that, what was at firſt claimed, and what I feared would be adhered to, his *official privilege*, is now waved; and conſequently requires not an anſwer.

But the mode pointed out by thoſe gentlemen is the moſt lucid order to diſplay their evidence: that it is right, in other words, to begin at the very ſtage where the tranſaction is ſaid, to have begun and to deſcend down to the treaſon. Now, Sir, if the charge was for conſpiring to commit treaſon, I would agree that this would be the moſt "lucid" way. There was a time in the hiſtory of Engliſh juriſprudence when conſpiring to commit the act of levying war, was high treaſon, and there every perſon who was concerned in that conſpiracy was made equally criminal and ſuffered death: for there the intention of the mind was made the conſpiracy; and where the mental action is the crime, every perſon was a principal, and thus I will acknowlege that the very mode of procedure was taken which is now propoſed to be taken. It was made to appear that the conſpiracy did exiſt, and every perſon who was engaged in it died; and the acts of others who did engage in it were appropriated to convey the crime to the ſufferer. But this was a treaſon of that ſort which is denominated compaſſing the death of the King. The mental act is ſuppoſed to be criminal in ſuch a caſe, but where you can have nothing to do with the mental act, how can you pretend to introduce the intention, without firſt proving the overt act? Now in caſes, in this country, where the treaſon is ſtated in the indictment to be *levying war*, you muſt prove this

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overt act upon the very same principles of evidence as you would Felony, Burglary, Larceny or any other crime, and the very same rules of evidence and mode of procedure to be adopted.

We say that it is in the natural order first to shew the act to have been committed. Do not the principles of common sense and this was the ground upon which the gentleman wished to go to day, for he told us that common sense sometimes led a different way from the practice of the Courts—does not common sense point out that the principal action should be first shewn to have been committed? Is it not absurd in terms, to go into evidence to prove the treasonable intention, without proving the act of treason upon the person charged? I presume the counsel cannot avoid admitting this. He says the Jury is to judge of the overt act. We admit it Sir. But do the gentlemen really mean to contend that the Court is not to determine whether any proof is given or can be given in evidence of any overt act having been committed—or on a failure of being able to produce such evidence, that the Court is not to stop the evidence from going farther, they not being able to prove the overt act stated in the indictment? If this is not the province of the Court, then indeed the arbitrary judges of England, ready to make every thing Treason, as the gentlemen have said, have most egregiously erred indeed, for there they have ventured to say that if but one witness was brought forward to prove the treason, the party must be acquitted. Now, Sir, this is all that we want: we want to be placed in such a situation as that the Court shall not be taken up day after day to prove what at last can be of no service to the prosecution, and will be of no farther injury to us than the loss of that time. The jury will not be the more enlightened by it, because it belongs not to them, and therefore were they to be days engaged in hearing about treasonable intentions they could not give a verdict on such stories.

Now let us examine, Sir, what has always been the order of evidence. It is the order which is most natural. The proceedings in Hardy's case, which the gentleman quoted, is exactly the legal course of evidence, and that very case confirms us in the doctrine for which we contend. Let me put a case of murder. Suppose A. kill's B. but how are you to prove that A is the murderer of B, till you prove that B is really dead. If it was proved that B was killed and that A did kill him, the prosecutor need not go into any farther evidence, except the defendant should produce some, because the law would presume that he was killed by malice *propense*, and if evidence is offered to ameliorate, then the prosecutor rebuts it by proving the malice. So with respect to stealing a horse, or any other felony: prove the article to have been stolen, and then prove that it was stolen by a felonious intention. But you are not to prove a felonious intention upon any man, when the crime has not been committed. In burglary,

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is it the natural order of teſtimony to prove that A intended to enter into B's houſe to rob him? Or is it not more natural to prove firſt that A did break into the houſe of B, and for no other purpoſe but that of ſtealing? So with a caſe of importing baſe coin into great Britain knowing it to be baſe; would it be proper to ſhew firſt that this man knew certain coin to be baſe, or would it not be firſt neceſſary to ſhew that he did import it, and then prove that he knew it to be baſe? For however baſe, there was no crime in his knowing it to be ſuch if he had nothing to do with it.

In this caſe, Sir, what do we claim? They charge us to be guilty of treaſon. But this is a vague expreſſion, and it may lead to error, we therefore require of them firſt to explain how, and of what kind of treaſon we have been guilty. Is this wrong, Sir? The attorney wants to produce a certain witneſs or courſe of witneſſes which we deny that he has the power to do. Now as for Gen. Eaton's teſtimony, I ſhall leave it out of this queſtion whether it can be received at all or not, this is a queſtion which may probably merit a future diſcuſſion, but I contend that it cannot now be received.

Having made theſe obſervations, let me advert, Sir, to the caſe of Hardy. This was a treaſon conſiſting of a conſpiracy, or compaſſing of the King's death. M'Nally and Eaſt have each of them a chapter upon the very ſame ſubject. The rules eſtabliſhed there, are upon this principle; that the *intention* of the mind is the crime, and therefore the rules are extremely different from that of the *overt act*. But, there alſo, a lucid order of evidence is expreſsly laid down. Every caſe of this kind is eſtabliſhed by two ſuits of evidence: one goes to ſhow that there is a conſpiracy for that ſpecial purpoſe. Now in order to eſtabliſh this point, they go into a review of any man's conduct, and not merely that the priſoner at the bar; but I ſpeak of the legal order, or what branch of the charge muſt be firſt proved. In the next place, or when the foundation is laid down, that a conſpiracy has been formed to take the life of the King, then they go to bring it home upon the perſon charged, and to eſtabliſh how far he was connected with it. Then, and not till then, he is charged with being guilty of the act of conſpiracy. And as almoſt every proſecution for treaſon in England is of that ſpecies of Treaſon, ſo almoſt all their rules are drawn from that ſubject. Thus, enliſting ſoldiers, writing letters tending to conſpiracy; or adviſing perſons into it are all parts of the conſpiracy of compaſſing the King's death, in fact. There are, in fact, many things which have crept into the code of Britiſh laws on this ſubject which I hope will never be introduced here, and yet we are under the neceſſity of paying ſome attention to them.

The caſe of Hardy was adverted to, to prove the independence of the attorney. How was that? the queſtion by Mr. Erſkine,

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who was of Hardy's counsel, related not to the common order of time: he objected that the evidence was not to the fact. But it was exactly that sort of testimony which is admitted in all cases of this kind, to shew the conspiracy. It was testimony by which the Attorney wanted to prove the connection to exist between the Scotch Convention and the London Correspouding Society, and thus to prove a general conspiracy. But, what did the Court say? Why, that it would not affect the prisoner without its being brought home to him: it must be established that Hardy was connected with it: but the conspiracy was first to be established. And this is the order we contend for. But, says the gentleman, the attempt was made to see whether Hardy did approve of, and was connected with, the Scotch convention. True, but the existence of that convention was before known. And then the attorney was permitted to go on: and why, Sir? because the conspiracy was proved, and the attorney promised the Court to connect the prisoner with it, by and by. The Courts of Great Britain, Sir, are not in the habit of perverting the law to accommodate any attorney whatever. In consequence, *there* flows the "lucid order" of evidence which we want to see followed here—an order under which we have been and ought ever to be governed. How, Sir, could it be proved that Hardy approved of these proceedings, without proving that there was something done for him to approve of? And this is precisely the course we want to go; we want to know what was done, before we can permit our intentions to be looked into.

We fear not for the intentions of Col. Burr to be exposed at any time, because we are persuaded that they will turn out to be innocent: but we see no necessity for this scrutiny in such a period of the examination. We want to have the facts proved first. Until we know what are the overt acts that they mean to charge us with, how can we, or how can the Court know whether this testimony ought to be brought forward at all or not? It appears to me really, that the gentlemen are a little skittish in coming into this overt act of war: it seems that they begin to suspect! what I prophecied about it a long time ago: that this act, which Gen. Wilkinson had almost led the whole country to believe was done, will turn out to be infinitely less important than the hot water rebellion, for I shall prove the innocency of this affair, as there was not even a drop of hot water spouted upon any one.

The proceeding of the previous examination before one of your honours was mentioned, and there it was true that it was of no importance in what order the evidence was brought out, because you were capable of discriminating its properties and weight, or even to hear illegal testimony which you would pay little regard to. But this is not the case before a jury. They may receive, from such testimony, influences and impressions

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which it would be difficult, if poſſible to diveſt themſelves of: And for this reaſon a Court is ſet up to judge of the propriety and order of evidence.

But it was ſaid that it was out of tenderneſs to Col. Burr that they choſe to proceed thus. Humane creatures indeed. The ſame ſort of tenderneſs which they have been cheriſhing ever ſince November laſt. Let the impreſſion it has had upon the public mind ſpeak for itſelf. Was there not the ſame danger of poſſeſſing the public mind before, when Col. Burr was to be committed? The Court could not commit, unleſs there was ſatisfactory proof as to the intention. There, after they had given teſtimony of what they called the overt act, they were going on to prove the intention: I arrived juſt as they were beginning, and it was my deſire that they ſhould go on with the examination of their witneſſes, but they did not think proper ſo to do. I was anxious that it ſhould be laid before the world, that the world might ſee it, for we were not afraid to ſee and expoſe the truth. I wiſh all the world could ſee it, and they would be able to diſcover from whom all thoſe commotions and alarms, which have taken place in the public mind, originated.

Sir, we have made a motion to the Court in conſequence of ſo much time having been waſted, and our anticipations of what time may be waſted by taking a wrong courſe. May I not claim as much charity from them as they would wiſh us to be influenced by reſpecting them, when I ſo declare; and when I add that I riſe to addreſs this Court from the pureſt of motives, when I riſe in favour of a gentleman as free from any treaſonable intentions as a child unborn. And ſo far was his object from treaſonable, that it would have been of ſervice to the world had he been able to have executed it. We riſe not to waſte the time of the Court or to hear ourſelves ſpeak, but we are governed by motives of honour and integrity. It may be that our arguments are weak: if ſo, it ariſes from our want of legal knowledge. Call us ignoramuſes, if they pleaſe, but I truſt, at leaſt, that they will believe us to be honeſt.

TUESDAY, Auguſt 18.

The CHIEF JUSTICE delivered the following opinion on the motion made yeſterday reſpecting the routine of evidences.

Although this is preciſely the ſame queſtion, relative to the order of evidence, which was decided by this Court, on the motion to commit, yet it is now preſented under ſomewhat different circumſtances, and may, therefore, not be conſidered as determined by the former deciſion. At that time, no indictment was found, no pleadings exiſted, and there was no ſtandard by which the court could determine the relevancy of the teſtimony offered, until the fact to which it was to apply, ſhould be diſcloſed.—There is now an indictment, ſpecifying the charge which is to be

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proved, on the part of the profecution ; there is an iſſue made up, which preſents a point to which all the teſtimony muſt apply, and conſequently it is in the power of the Court to determine, with ſome accuracy, on the relevancy of the teſtimony which may be offered.

It is contended in ſupport of the motion which has been made, that, according to the regular order of evidence and the uſage of Courts, the exiſtence of the fact on which the charge depends, ought to be ſhown, before any teſtimony explanatory, or confirmatory of that fact can be received. Againſt the motion, it is contended that the crime alledged in the indictment, conſiſts of two parts, the fact and the intention ; and that is in the diſcretion of the attorney for the United States, firſt to adduce the one or the other ; that no inſtance ever has occurred of the interference of a Court with that arrangement which he has thought proper to make.

As is not unfrequent, the argument on both ſides appears to be, in many reſpects correct. It is the moſt uſual and appears to be the natural order of teſtimony to ſhow, firſt the exiſtence of the fact reſpecting which the enquiry is to be made. It is unqueſtionably attended with this advantage; there is a fixed and certain object to which the mind applies with preciſion, all the teſtimony which may be received, and the court can decide with leſs difficulty on the relevancy of all the teſtimony which may be offered. But this arrangement is not clearly ſhewn, to be eſtabliſhed by any fixed rule of evidence, and no caſe has been adduced in which it has been forced by the Court, on the counſel for the profecution.

On one ſide it has been contended, that by requiring the exhibition of the fact in the firſt inſtance, a great deal of time may be ſaved, ſince there may be a total failure of proof with reſpect to the fact;—and this argument has been anſwered, by obſerving, that ſhould there even be ſuch a failure, they could not interpoſe and arreſt the progreſs of the cauſe ; but muſt permit the counſel for the profecution to proceed with that teſtimony which is now offered.

Levying of war, is a fact which muſt be decided by the Jury. The Court may give general inſtructions on this, as on every other queſtion brought before them, but the Jury muſt decide upon it, as it is compounded of fact and law. Two aſſemblages of men not unlike in appearance, poſſibly may be, the one treaſonable and the other innocent. If, therefore, the fact exhibited to the court and jury, ſhould, in the opinion of the Court, not amount to the act of levying war, the Court could not ſtop the proſecution—but muſt permit the counſel for the United States to proceed to ſhew the intention of the act, in order to enable the Jury to decide upon the fact, coupled with the intention.

The conſumption of time would probably be nearly the ſame,

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whether the counſel for the proſecution commenced with the fact, or the intention, provided thoſe diſcuſſions, which reſpect the admiſſibility of evidence, would be as much avoided in the one mode as the other. The principal importance which, viewing the queſtion in this light, would ſeem to attach to its deciſion, is the different impreſſions which the fact itſelf might make, if exhibited at the commencement or cloſe of the proſecution.

Although human laws puniſh actions, the human mind ſpontaneouſly attaches guilt to intentions. The ſame fact, therefore, may be viewed very differently, where the mind is prepared by a courſe of teſtimony, calculated to impreſs it with a conviction of the criminal deſigns of the accuſed, and where the fact is ſtated without ſuch preparation. The overt act may be ſuch as to influence the opinion, on the teſtimony afterwards given, reſpecting the intention; and the teſtimony reſpecting the intention, may be ſuch, as to influence the opinion on the teſtimony, which may be afterwards given reſpecting the overt act.

On the queſtion of conſuming time, the argument was placed in one point of view by the counſel for the defence, which excited ſome doubt. The caſe was ſuppoſed of only one witneſs to the overt act, and a declaration that it could be proved by no other. The Court aſked whether the counſel would be permitted then to proceed to examine the intentions of the accuſed, and to do worſe than waſte the time of the Court and Jury, by expoſing, without a poſſible object, the private views and intentions of any perſon whatever.

Perhaps, in ſuch a caſe, the cauſe might be arreſted, but this does not appear to warrant the inference that it might be arreſted, becauſe the fact proved by the two witneſſes did not appear to the Court, to amount to the act of levying war. In the caſe ſuppoſed, the declaration of the law is poſitive, and a point proper to be referred to the Court occurs, which ſuſpends the right of the Jury, to conſider the ſubject, and compels them to bring in a verdict of not guilty. In ſuch a caſe, no teſtimony could be relevant, and all teſtimony ought to be excluded. Suppoſe the counſel for the proſecution ſhould ſay that he had no teſtimony to prove the treaſonable intention: That he believed confidently the object of the aſſemblage of men on Blannerhaſſet's Iſland to be innocent: That it did not amount to the crime of levying war. Surely it would be a wanton and uſeleſs waſte of time to proceed with the examination of the overt act. When ſuch a caſe occurs, it cannot be doubted that a *nolle proſequi* will be entered, or the Jury be directed, with the conſent of the attorney, to find a verdict of not guilty.

It has been truly ſtated that the crime alledged in the indictment conſiſts of the fact, and of the intention with which that fact was committed. The teſtimony diſcloſing both the fact and the intention muſt be relevant. The Court finds no expreſs

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rule stating the order in which the attorney is to adduce relevant testimony, nor any case in which a Court has interfered with the arrangement he has made. No alteration of that arrangement therefore will now be directed.

But it is proper to add, that the intention which is considered as relevant in this stage of the enquiry, is the intention which composes a part of the crime, the intention with which the overt act itself was committed; not a general evil disposition, or an intention to commit a distinct fact. This species of testimony, if admissible at all, is received as corroborative or confirmatory testimony. It does not, itself, prove the intention with which the act was performed, but it renders other testimony probable which goes to that intention. It is explanatory of, or assistant to, that other testimony. Now it is essentially repugnant to the usages of Courts, to the declarations of the books by whose authority such testimony is received, that corroborative or confirmatory testimony should precede that which it is to corroborate or confirm. Until the introductory testimony be given, that which is merely corroborative is not relevant, and of consequence, if objected to, cannot be admitted without violating the best settled rules of evidence.

This position may be illustrated by a direct application to the testimony of Gen. Eaton. So far as his testimony relates to the fact charged in the indictment, so far as relates to levying war on Blannerhasset's island, so far as it relates to a design to seize on New-Orleans, or to separate by force, the western from the atlantic states, it is deemed relevant, and is now admissible. So far as it respects other plans to be executed in the city of Washington or elsewhere, if it indicates a treasonable design, it is a design to commit a distinct act of treason, and is therefore not relevant to the present indictment. It can only, by shewing a general evil intention, render it more probable that the intention in the particular case was evil; it is merely additional or corroborative testimony, and therefore, if admissible at any time, is only admissible according to rules and principles which the Court must respect, after hearing that which it is to confirm.

The counsel will perceive how many questions respecting the relevancy of testimony, the arrangement proposed on the part of the prosecution will most probably produce. He is however at liberty to proceed according to his own judgment, and the court feels itself bound to exclude such testimony only, as, at the time of its being offered, does not appear to be relevant.

Some arrangements were made for the accommodation of the Jury: It was directed they should occupy two or more rooms in the Capitol; that they might take their meals at the Swan tavern; that, for the sake of exercise, they might walk out in a body, or separate, if accompanied by the Marshal or a deputy; that they might send or receive letters if the superscriptions were

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ſhewn to the Marſhal, or if any thing contained in them, be of an improper nature, that they would exhibit it to the Court.

WILLIAM EATON was then called and ſworn.

Mr. Eaton expreſſed a wiſh to ſhape his evidence conformably to the directions of the Court juſt given.

Mr. Hay. By the directions of the Court it will not be proper for you to ſtate converſations which do not relate to the iſſue.

Mr. Eaton. I heard the opinion of the Court and underſtand it diſtinctly.

Mr. Hay. Under that opinion then you will relate what you know.

Mr. Eaton. Will it be permitted for me to have recurrence to my notes in ſtating my evidence?

Chief Juſtice. Were they written by yourſelf?

Mr. Eaton. Yes, they were.

Mr. Wickham. At what time?

Mr. Eaton. At no particular time. The notes I have in my hand are only memoranda; and I wiſh to uſe it merely for the purpoſe of keeping my ſtory connected.

Mr. Burr. What is the nature of them, and when were they made?

Mr. Eaton. They are taken from converſations which paſſed between you and myſelf at different periods; they were made ſince I have been in this place, from my recollection in part, and part from my recurrence to my notes.

Mr. Martin. Have you thoſe notes here?

Mr. Eaton. I have them at my lodgings.

Mr. Lee. I ſuppoſe there can be no doubt on this ſubject—that the witneſs has no right to recur to his notes, made perhaps two or three years ago. If he has the original papers, written at the time the converſations happened, that might be brought here to refreſh his memory, but recent papers ought not.

Mr. M'Rae. Can there be any real difference between a copy and the original notes, if the witneſs declares upon its accuracy.

Chief Juſtice. If the witneſs had a literal copy, which he had made at the time of the converſations, he would undoubtedly have a right to refer to it to refreſh his memory; I do not think that any paper, recently written, which has been formed upon memory of a circumſtance which paſſed ſome time ago, or which is formed in a conſiderable degree from memory, ought to be referred to. If there were particular words expreſſed, and the witneſs means to repeat thoſe words, and refers to any paper which he might have written to refreſh his memory, there can be no objection to his referring to ſuch a paper.

Mr. Eaton. I have not ſuch a paper, ſir. I beg permiſſion to aſk one further indulgence. I have been long before the public; much ſtricture and ſome ſeverity have paſſed upon my conduct; I aſk whether I may, occaſionally, in the courſe of my

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testimony, make some explanations to exemplify my own motives and intentions.

Chief Justice. Perhaps it would be a more correct way for the Court to permit the evidence to go on, and afterwards to decide upon the propriety of it; the Court are bound to hear the evidence; if there are any objections made, it will hear them, and decide upon their force; but if any explanations are made by the witnesses of their motives, if they do not employ much of the time of the Court, it cannot be objected to; but if there should be any unnecessary time or explanations used, the Court must decide against it.

Mr. Eaton. Concerning any overt act, which will go to prove Treason against Col. Burr, I know nothing.

Mr. Hay. We wish you to state to the Court and Jury, what occurred in any conversations which you might have had with Mr. Burr, at any time, relating to the charge before the Court.

Mr. Eaton. I am coming to that; I began in this way in order to prevent any questions which might be proposed on that subject. Concerning any of the transactions on Blannerhaslet's island; or concerning any agency which Mr. Burr may have had in what is considered a Treason committed there, I know nothing. But concerning Col. Burr's conversations which may be supposed to express his treasonable intentions, I know much, and it is this—

Mr. Martin. I know not how far the opinion of the Court extends.

Chief Justice. The intention of the Court, as to the evidence, is this—If there be proof of any *intention* that was formed relative to this distinct treason on Blannerhaslet's island, although that conversation might have occurred two or three years before, it might be heard in evidence. Any evidence of the continuance of an intention formed at a certain prior period is applicable, and consequently evidence of the continuance of an intention must be relevant; thus, although testimony of itself, may not be sufficient to conviction, other relevant testimony, and of the same sort, may be admitted as corroborative; and its remoteness cannot, in this view, remove its applicancy.

Mr. Martin. I trust then, that when he deviates from the rule the Court will stop him.

Mr. Wickham. I take the rule of the Court not to extend beyond the act of Treason committed in Virginia; the witness says he knows nothing of any Treason committed in Virginia, and it does not appear that he knows any thing of any intention of committing the crime as charged in the indictment.

Chief Justice. The opinion perhaps is not well understood; One part of the indictment laid, is a charge of Treason in proceeding towards the seizure of New-Orleans, and another is the holding of it, to make it the capital of an empire in distinction from the United States. Now, the Court say, that the expression

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of any intention towards the accompliſhment of this object, though not in itſelf criminal, might be produced to ſhew the nature of a tranſaction afterwards performed. Thus, any intentions, ſometime ago expreſſed to divide the Union, to form a diſtinct empire in the Weſt; or to ſeize on the city and property of New-Orleans, might be heard, and might even give a better view of the tranſactions on Blannerhaſſet's iſland, although without the crime is proved to have been committed *there*, they can be of no avail.

Mr. Eaton. During the winter of 1805-6, I cannot be poſitive as to the diſtinct point of time, yet, during that winter, at the city of Waſhington, Aaron Burr ſignified to me that he was organizing an expedition to be moved againſt the Spaniſh provinces on the South-Weſtern frontiers of the United States, I underſtood, under the authority of the general government. From our exiſting controverſies with Spain, and from the tenor of the Preſident's Communications to both Houſes of Congreſs, a concluſion was naturally drawn, that war with that power was inevitable. I had juſt then returned from the coaſt of Africa, and having been for many years employed on our frontier, or on a coaſt more barbarous and obſcure, I was ignorant of the eſtimation in which col. Burr was held by his country—The diſtinguiſhed rank he had held in ſociety, and the ſtrong marks of confidence which he had received from his fellow-citizens, did not permit me to doubt of his patriotiſm. As a military character, I had not been made acquainted with one within the U. States, under whoſe direction a ſoldier might with greater ſecurity confide his honour. In caſe my country's being involved in a war, I ſhould have thought it my duty to obey ſo honourable a call as was propoſed to me. Under impreſſions like theſe, I did engage to embark in the enterprize, and pledged myſelf to col. Burr's confidence. At ſeveral interviews, it appeared to be his intention to convince me by maps and other documents of the feaſibility of penetrating to Mexico. At length from certain indiſtinct expreſſions and inuendos, I admitted a ſuſpicion, that col. Burr had other projects. He uſed ſtrong expreſſions of reproach againſt the adminiſtration of the government; accuſed them of want of character, want of energy, and want of gratitude. He ſeemed deſirous of irritating my reſentment by dilating on certain injurious ſtrictures I had received on the floor of Congreſs on account of certain tranſactions on the coaſts of Tripoli; and alſo on the delays in adjuſting my accounts for advances of money on account of the United States; and talked of pointing out to me modes of honourable indemnity.

I will not conceal here, that col. Burr had good grounds of reaſon for ſuppoſing me diſaffected towards the government; I had indeed ſuffered much from delays in adjuſting my accounts for caſh advanced to the government whilſt I was conſul at Tunis,

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and for the expence of maintaining the war with Tripoli. I had but a ſhort time before been compelled ingloriouſly to ſtrike the flag of my country on the ramparts of a defeated enemy, where it had flown for 45 days. I had been compelled to abandon my comrades in war on the fields where they had fought our battles. I had ſeen caſh offered to the half vanquiſhed chief of Tripoli (as he had himſelf acknowledged) as the price of pacification—(*Mr. Wickham.* By whom? A. By our negociator)—when as yet no exertion had been made by our naval ſquadron to coerce that enemy. I had ſeen the conduct of the author of theſe blemiſhes on our then proud national character, if not recommended—not cenſured; whilſt my own inadequate efforts to ſupport that character were attempted to be thrown into ſhade. To feelings naturally ariſing out of circumſtances like theſe, I did give ſtrong expreſſions. Here I beg leave to obſerve in juſtice to myſelf, that however ſtrong thoſe expreſſions, however harſh the language I employed, they would not juſtify the inference, that I was prepared to dip my ſabre in the blood of my countrymen, much leſs of their children, which I believe would have been the caſe, had this conſpiracy been carried into effect. (Mr. *Martin* objected to this language.) I liſtened to col. Burr's mode of indemnity; and as I had by this time begun to ſuſpect that the military expedition he had on foot was unlawful, I permitted him to believe myſelf reſigned to his influence, that I might underſtand the extent and motive of his arrangements. Col. Burr now laid open his project of revolutionizing the territory Weſt of the Alleghany; eſtabliſhing an independent empire there, New-Orleans to be the Capital and he himſelf to be the Chief; organizing a military force on the waters of the Miſſiſippi, and carrying conqueſt to Mexico.

After much converſation (which I do not particularly recollect) reſpecting the feaſibility of the project; as was natural, I ſtated impediments to his operations; ſuch as the republican habits of the citizens of that country, their attachment to the preſent adminiſtration of government, the want of funds, the oppoſition he would experience from the regular army of the United States, ſtationed on that frontier; and the reſiſtance to be expected from Miranda, in caſe he ſhould ſucceed in republicanizing the Mexicans. Col. B. ſeemed to have no difficulty in removing theſe obſtacles. He ſtated to me, that he had in perſon (I think the preceding ſeaſon) made a tour through that country; that he had ſecured to his intereſts and attached to his perſon the moſt diſtinguiſhed citizens of Tenneſſee, Kentucky and Territory of Orleans; that he had inexhauſtible reſources and funds; that the army of the U. S. would act with him; that it would be reinforced by 10 or 12,000 men from the above mentioned ſtates and territory; that he had powerful agents in the Spaniſh Territory, and, "as for Miranda," ſaid Mr. Burr facetiouſly, "we

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must hang Miranda.'' In the course of repeated conversations on this subject, he proposed to give me a distinguished command in his army; I understood the second command. I asked him, who would command in chief. He said, General Wilkinson.—I observed that it was singular, he should count upon Gen. Wilkinson. The distinguished command and high trust he held under government, as the commander in chief of our army; and as governor of a Province, he would not be apt to put at hazard for any precarious objects of aggrandizement—Colonel Burr stated that General Wilkinson balanced in the confidence of his country; that it was doubtful whether he would much longer retain the distinction and confidence he now enjoyed; and that he was prepared to secure to himself a permanency. I asked Col. Burr if he knew General Wilkinson. He said, yes; and echoed the question. I told him that 12 years ago, I was at the same time a captain in his wing of the legion of the U. S. his acting brigade major and aid de camp; and that I thought I knewhim well. He asked me, what I knew of Gen. Wilkinson. I said, I knew Gen. Wilkinson would act as Lieut. to no man in existence. "You are in an error," said Mr. Burr, "Wilkinson will act as *Lieutenant to me.*" From the tenor of much conversation on this subject, I was prevailed on to believe that the plan of revolution meditated by Col. Burr and communicated to me, had been concerted with Gen. Wilkinson and would have his co-operation; for Col. Burr repeatedly, and very confidently expressed his belief, that the influence of Gen. Wilkinson with his army, the promise of double pay and rations, the ambition of his officers, and the prospect of plunder and military atchievements, would bring the army generally into the measure—I pass over here, a conversation which took place between Col. Burr and myself, respecting a central revolution, as it is decided to be irrelevant by the opinion of the bench. (Mr *Hay*. You allude to a revolution for overthrowing the government at Washington and of revolutionizing the eastern states.) I was passing over that to come down to the period when I supposed he had relinquished that design, and returned to his project in the west. I was thoroughly convinced myself, that such a project was already so far organized, as to be dangerous, and that it would require an effort to suppress it. For in addition to positive assurances that Col. Burr had of assistance and co-operation, he said that the vast extent of territory of the United States beyond the mountains which offered to adventurers, together with a view on the mines of Mexico, would bring adherents to him from all quarters of the union. The situation in which these communications and the impressions they made upon me, placed me in, was peculiarly delicate. I had no overt act to produce against Col. Burr. He had given me nothing upon paper; nor did I know of any person in the vicinity, who had received similar

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communications, and whose testimony might support mine. He had mentioned to me none, as principally and decidedly engaged with him, but Gen. Wilkinson; a Mr. Alston, who I afterwards learnt was his son-in-law; and a Mr. Ephraim Kibby, who, I learnt, was late a captain of Rangers in Wayne's army. Of Gen. Wilkinson Burr said much, as I have stated: of Mr. Alston very little but enough to satisfy me that he was engaged in the project: and of Kibby he said, that he was brigade major in the vicinity of Cincinnati (whether C. in Ohio or in Kentucky I know not,) who had much influence with the militia and had already engaged the majority of the brigade to which he belonged, who were ready to march at Mr. Burr's signal. Mr. Burr talked of this revolution as a matter of right, inherent in the people and constitutional; a revolution which would rather be advantageous than detrimental to the Atlantic States: a revolution, which must eventually take place; and for the operation of which the present crisis was peculiarly favorable; that there was no energy to be dreaded in the general government, and his conversations denoted a confidence, that his arrangements were so well made that he should meet with no opposition at N. Orleans; for the army and the chief citizens of that place were ready to receive him. On the solitary ground upon which I stood, I was at a loss how to conduct myself, though at no loss as respected my duty. I durst not place my lonely testimony in the balance against the weight of Col. Burr's character, for by turning the tables upon me, which I thought any man capable of such a project might very *conscientiously* do, I should sink under that weight. I resolved therefore with myself to obtain the removal of Mr. Burr from this country, in a way honourable to him, and on this I did consult him without his kowing my motive. Accordingly I waited on the President of the U. S. and after a desultory conversation, in which I aimed to draw his attention to the West, I said to him (I took the liberty of suggesting to the P.) that I thought Col. Burr ought to be removed from the country becaufe I considered him dangerous in it. The President asked where we should send him. I said to England or Madrid, though it has been said in some publications that I added Cadiz. The President (without any positive expression in such a matter of delicacy) seemed to think the trust too important and expressed something like a doubt about the integrity of Mr. Burr, I frankly told the President that perhaps no person had stronger grounds to suspect that integrity than I had: but that I believed his pride of ambition had so predominated over his other passions, that when placed on an eminence and put on his honor, a respect to himself would secure his fidelity. I perceived that the subject was disagreeable to the President, and to bring him to my point in the shortest mode and in a manner which would point to the danger; I said to him, if Col. Burr was not disposed of, we should in 18 months have an insurrec-

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tion, if not a revolution on the waters of the Miſſiſſippi. The Preſident ſaid he had too much confidence in the information, the integrity, and attachment of the people of that country to the union, to admit any apprehenſions of that kind. The circumſtances of no interrogatories being made to me, I thought, impoſed ſilence upon me at the time and place.

Here, Sir, I beg indulgence to declare my motives for recommending that gentleman to a foreign miſſion at that time, and in the ſolemnity with which I ſtand here, I declare that Col. Burr was neutral in my feelings; that it was through no attachment to him that I made that ſuggeſtion, but to avert a great national calamity which I ſaw approaching, to arreſt a tempeſt which ſeemed lowering in the weſt, and to divert into a channel of uſefulneſs thoſe conſummate talents, which were to mount "the whirlwind and direct the ſtorm." About the time of my having waited on the Preſident or a little before, I determined at all events to have ſome evidence of the uprightneſs of his intentions, and to fortify myſelf by the advice of more experienced men. I waited upon two members of the H. of Repreſentatives whoſe friendſhip I had the honor long to retain, and in whoſe wiſdom and integrity I had full faith (I am at liberty to give their names if required) and, I believe, a ſenator, but of that I am not certain. I opened to them the projects of Col. B. They did not ſeem much alarmed.

Mr. Martin ſtopped the witneſs, objecting to a relation of any converſation had with third perſons.

Mr. Wickham. If the proper rules of evidence had been followed, we ſhould have had no objection to this witneſs, or any one elſe to have ſtated whatever he pleaſed that related to the caſe, but as we have not our wiſhes upon that ſubject, we ſhall rely upon the Court ſtopping any thing that may go out of the controverſy; not doubting but they will keep the witneſſes ſtraight.

Chief Juſtice. Converſations between Gen. Eaton and others can only anſwer one purpoſe, and that is, to ſhew the narrative; and to ſhew that he made the ſame repreſentations as at other times. When his conduct is arrayed, there will be a propriety in interrogatories: But before that it will be proper that he proceed with the narrative.

Mr. Wickham. As the gentlemen have gone on in their own very improper way, I ſhall rely upon the Court ſtopping any perſon whenever he goes out of the way: at any rate, any ſuch evidence will be objected to by us.

Mr. Hay expreſſed his ſurprize at ſuch declarations from the gentleman—I ſay, Sir, that it is not improper nor extraordinary. Does he ſuppoſe that we have any improper motive in purſuing this courſe? I ſay that we have not, and therefore I am authorized to ſay that he is incorrect in his obſervations.

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Mr. Wickham. When I ſaid improper, I did not mean illegal, becauſe the Court ſanctioned the meaſure. With his motives I have nothing to do: they may be ſtrongly commendable, but every perſon muſt be ſtruck with the extreme inconvenience of this method of conducting the caſe.

Mr. Wirt ſaid he had no diſpoſition to conſume the time of the Court, but he conceived it to be extremely wrong that the Jury ſhould be attempted to be impreſſed with an opinion that the proſecution were in the leaſt deſirous not to afford the means of a fair trial, or that it was their wiſh in the leaſt degree to wrong the priſoner. It might be inconvenient, to the other ſide, to give a true and full developement of the ſtory, he believed they had cauſe to ſhrink from it, but it was convenient to them, and it was extremely deſirous that the whole truth ſhould be known, as to what Gen. Eaton is, for it is well known that his conduct has been violently aſſailed—aſſailed in the public papers, and aſſailed by the gentlemen themſelves. And he has undoubtedly a right to avail himſelf of this opportunity to vindicate himſelf to his country. I ſuppoſe, however, that he is to underſtand that his declarations remain unimpeached, till they are impeached at the bar, and I ſuppoſe then, if he ſhould think proper to come out and explain himſelf, gentlemen would be ſatisfied.

Mr. Martin ſaid he did not expect this obſervation would have cauſed ſo much diſcuſſion: it was only his wiſh to confine the witneſs to what he had heard himſelf, and not to extend it to the converſations and obſervations of others. It was only their wiſh that the Court would be ſo obliging as to keep the evidence within the rule. The gentleman ſays that he only wants to ſee the hiſtory of this circumſtance. Sir, in the moſt arbitrary reigns in Great Britain, it never has been required to go into a hiſtory of tranſactions previous to the act charged, except thoſe things related to the facts charged, and never then until the levying of war was proved. The attorney there has no particular privilege. I am perfectly ſure there is no precedent in all the books upon the ſubject.

Chief Juſtice. It is certain that the witneſſes ought not to relate converſations or impreſſions of other perſons; but I am ſure that a greater waſte of time, and a greater injury would be experienced if the witneſs is interrupted than if he goes on.

Mr. Burr. It is evident that I have not hitherto interpoſed, although I am certain that very little, if any of the relations of the witneſs has any concern with the matter in iſſue. Inſtead of being againſt it, I ought to be for it, becauſe it may tend to confuſe. But I find myſelf foreſtalled by the obſervation of the Court, which, if I underſtood it, was contrary to any thing that I have heard. The introduction of the witneſs himſelf is a proof of that opinion, which is that evidence of intention of two or three years ſtanding might be given, and that evidence ſhall be taken

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from any place. Now it would appear to me obvious that the danger and inconvenience which might arise from such a permission, should exclude every thing of the kind. I did not interfere at all, because I presumed that the Court would interfere. At some very short period of time, I shall think it incumbent on me to endeavour to narrow the case down to its natural bounds. Every thing which is not legal, has a natural tendency to throw into obscurity, and must consequently be improper: its effects prove it to be so. Now it never has been said by a Court that there was not a propriety in one mode of proceeding in preference to another: and therefore we did expect that this Court would confine the prosecution down to suitable rules, that the minds of the Jury should not be confused in the case.

Chief Justice. The Court did explain its principles, and the points to which it would expect testimony to be given. It is impossible for the Court to know the precise bearing which testimony might have. The witness will confine himself to the directions given. Oftentimes, it is clear, more time is lost by correcting a witness, than by letting him take his own course. The witness will confine himself to the opinion given.

Mr. Eaton. I asked indulgence of the Court to go into a statement of my motives, by way of explanation, because many misconstructions of my conduct were circulated to the public: I wished now to have done it, but I wave the indulgence, and content myself with meeting these perversions at any proper time and place.

Chief Justice. The Court think that you have used it. All they say is, that declarations of any other gentleman to you, need not be recited.

Mr. Eaton. Little more passed between Col. Burr and myself after that, on the subject relevant to this enquiry. Whilst I remained at Washington our intercourse was less frequent, although Mr. Burr was constantly solicitous to engage me in the expedition. I returned to Massachusetts to my domestic concerns, and thought no more of Col. Burr's projects, until twelve months afterwards. In October last a letter was put into my hands from a Mr. Maurice Bellknap to a person in Marietta, named T. E. Danielson, stating that Mr. Burr was engaging the building of boats on the Ohio.

Mr. Burr. Have you got a copy of that letter?

Mr. Eaton. I have not.

Mr Burr. Then it is improper to state any thing of the contents of it.

Mr. Hay. It is immaterial; Mr. Bellknap is here.

Mr. Eaton. I can say nothing more respecting any communications made to me after he went to the Westward. It may not be proper, perhaps, to state what I communicated to the President.

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Mr. Hay. It may be proper; pleaſe to proceed.

Mr. Burr objected.

Mr. Eaton. I was about to ſtate that, after finding theſe movements going forward on the waters of the Ohio, I made a ſtatement of the converſations I had had with Col. B. to the Preſident of the U. States, through Mr. Granger, the Poſt-Maſter-General, by way of explanation of what might be doing there.

Mr. Wirt. The frequent interruptions which you have received make it neceſſary that we ſhould put a few queſtions to you by way of explanation.

Was there any converſation between you and the priſoner, in which you ſpoke of the odium attached to the name of *uſurper*? *A.* That converſation was excluded by the opinion of the Court, as relating to the *central project.*—Mr. *Hay.* Did you mean to ſtate that the *honourable indemnity*, propoſed to you by the priſoner, was to be included in this plan? *A.* I underſtood it to be included in the permanent rank and emolument to be aſſigned me; in his full confidence, that he ſhould erect a government of which he was to be the chief.

Croſs queſtioned.

Mr. *Martin.* Do you recollect when you arrived in Waſhington? *A.* I ſaid that I did not recollect particularly. But the principal part of theſe converſations muſt have been between the middle of February and the latter end of March. *Q.* Was there any particular conduct calculated to put an end to Col. Burr's importunities? *A.* Yes. At ſome of our laſt interviews, I laid on his table, a paper containing this toaſt which I had given to the public: *The United States—Palſey to the brain that ſhould plot to diſmember, and leproſy to the hand that will not draw to defend our union.* *Q.* Where was that toaſt drunk? *A.* I cannot ſay. This queſtion was made to me from authority. It was ſent with other toaſts I had corrected, to a paper at Springfield. I laid this paper on Col. Burr's table, that he might ſee it; and I have reaſons to believe that he did. *Q.* Was it drunk at any diſtant place? At Philadelphia? *A.* I do not recollect. I thought at firſt it was Philadelphia; but I had received many hoſpitalities throughout the union; many of my toaſts were publiſhed; and in the hurry of paſſing and repaſſing, I have completely forgotten. Mr. *Burr.* Do you recollect when you left Waſhington? *A.* About the 5th or 6th April. *Q.* Can you not be certain where this toaſt was drunk? At Waſhington or at Philadelphia? *A.* I am certain it was not at Waſhington, becauſe I gave another there when called upon. *Q.* Did you ſay, that all thoſe converſations happened between the middle of February and the laſt of March. *A.* No: I did not ſay ſo. I ſaid the principal part of theſe converſations. *Q.* You ſay that the toaſt was printed at Springfield? *A.* I did. *Q.* Have you in your poſſeſſion a paper containing the toaſt? *A.* I have not here. *Q.* You mentioned

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ſomething about a communication which you made to the Preſident through the Poſt M. General. Look at that paper. Is that your ſignature? *A.* It is; and I muſt give a ſhort account of that paper. Mr. *E.* then mentioned that the notes on the two firſt pages were drawn up by Mr. Granger, from converſations which had paſſed between Mr. G. and a Mr. Ely, on certain communications made to Mr. Ely by Mr. Eaton, reſpecting Col. B's plan; that he had ſeen Mr. Ely at Northampton at the ſeſſion of the Court of common pleas, at a time when they had firſt heard of the building of boats on the Ohio. The notes on the laſt page, in Mr. Granger's writing, and ſubſcribed by himſelf, were from ſubſequent converſations between him and Mr. G.

Mr. Burr. You ſpoke of accounts with the government. Did you or the government demand money? *A.* They had no demand on me. I demanded of them. *Q.* Did they ſtate in account a balance againſt you. *A.* I expended money for the ſervice of the United States when employed in my agency at Tunis; an account of which being preſented to the accounting officers of the treaſury, they, I was told, had no legal diſcretion to ſettle it. As there was no law to authoriſe this adjuſtment, I did refer to the Congreſs of 1803-4. A committee had reported on my claims, favourably as I had ſuppoſed. I repaired however to the coaſt of Barbary, and when I returned, found that new difficulties had occurred to an adjuſtment. Leaving out the ſums I had advanced, the government had a balance againſt me. The laſt ſeſſion of Congreſs has provided for the payment and the commiſſioners have ſettled it.

Mr. Martin. What balance did you receive?—*A.* That is *my* concern, ſir. Mr. *Burr.* What was the balance againſt you? Mr. *Eaton.* (To the Court.) Is that a proper queſtion, ſir? Mr. *Burr.* My object is manifeſt. I wiſh to ſhew the bias which has exiſted on the mind of the witneſs. *Chief Juſtice* ſaw no objections to the queſtion. Mr. *Eaton.* I can not ſay to a cent or a dollar: but I have received about 10,000 dollars. Mr. *Burr.* When was the money received? *A.* About March laſt. *Q.* You mentioned Miranda. Where did you underſtand he was gone to? *A.* On the benevolent project of revolutionizing the Spaniſh Provinces. *Q.* What part of them? *A.* Caraceas. I had ſome reaſon too to know ſomething of that project: becauſe I too was invited to join in *that*. He too was to have been a little Emperor; he might have been troubleſome to us; and of courſe when I aſked you what was to be done with him, you obſerved, "hang him." *Q.* Did you underſtand I was to do all at once; to execute the central project too as well as thoſe in the weſt? *A.* I have no objections to anſwering that; but it will be nothing in your favour. When Col. Burr was ſpeaking of a central revolution, not much was ſaid about his revolution in the weſt.—Had the other been effected, I doubt much whether you would have

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been willing to have ſeparated that part. *Q.* You ſpoke of a command. *A.* You ſtated, what I have already mentioned, that you were aſſured, from the arrangements which you had made, that an army would be ready to appear, when you went to the waters of the weſtern country. I recollect particularly the name of Ephraim Kibby. You aſked me about his ſpirit. You aſſerted that his brigade was ready to join you, and that the people alſo in that country were ready to co-operate. You ſpoke of *your* riflemen, *your* infantry, *your* cavalry. It was with the ſame view, you mentioned to me that that man (pointing to Gen. Wilkinſon juſt behind him) was to have been the firſt to aid you; and from the ſame views you have perhaps mentioned me.—Mr. *Martin* objected to the witneſs interpoſing his own opinions in this manner. Mr. *Hay*. Some allowance is to be made for the feelings of a man of honour. Mr. Eaton bowing apologiſed to the Court for the warmth of his manner. Mr. *Burr*. You ſpoke of my revolutionizing the weſtern ſtates. *A.* Your line was to be the Alleghany mountain. You were certain about Kentucky and Teneſſee; but expreſſed ſome doubts about Ohio; I well recollect *that* on account of the reaſon which you gave; that they were too much of a plodding, induſtrious people to engage in your plans. *Q.* How was this buſineſs to be effected? *A.* I underſtood that your agents were in the weſtern country; that the commander in chief was ready to co-operate with his army; and that theſe with the adventurers that would join you, would compel the ſtates to a ſeparation, Indeed you ſeemed to conſider New-Orleans as already yours and that from this point you would make conqueſts and conſolidate your empire. *Q.* Was it after all this, that you recommended me on an embaſſy? *A.* Yes; and becauſe I thought it the only way to avert a civil war. *Q.* Did you communicate your recommendation to me? *A.* Yes; you ſeemed to aſſent to the propoſition.

Q. What had become of your command? *A. That* I had diſpoſed of myſelf. *Q.* Did you underſtand that you had given me a definitive anſwer? *A.* No; after you had developed yourſelf, I determined to uſe you until that I had got every thing out of you; and on the principle that "when innocence is in danger, to break faith with a bad man, is not *fraud* but *virtue*.. *Q.* Did you think that your propoſition as to a foreign embaſſy which was ſo incompatible with my own plans, would be received by me with indifference; had I abandoned the project? *A.* You ſeemed to me to want ſome diſtinguiſhed place: as to the mode you were indifferent: and you ſeemed to acquieſce in the plan of a foreign embaſſy. Mr. *Hay*. You ſaid that you received about 10,000 dollars from the government. The act of Congreſs did not give you a definitive ſum. *A.* The act of Congreſs gave the accounting officers the power of ſettling with me, under the in-

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ſpection of the ſecretary of ſtate, under whoſe department I had ſerved, and the ſettlement was accordingly made.*

COMMODORE THOMAS TRUXTON *examined.*

Mr. Hay. Were you preſent when the Court pronounced their opinion reſpecting the Evidence.

Witneſs. Yes, Sir.—I know nothing reſpecting any overt act, or of any treaſonable practices deſigns or converſations of Col. Burr. *Q.* Will your's only relate to the expedition againſt the Spaniſh territories? *A.* No, Sir, *Q.* Nothing about New Orleans? *A.* No Sir.

Mr. Wickham was proceeding to aſk a queſtion whether the converſations with Col. Burr related to treaſon? when *Mr. Hay* ſtopped him, ſaying that if this controverſy was to continue, he did not know how the trial was ever to go on. He hoped that they would not be interrupted, ſince they were under the controul of the Court. Whether he was preſent at any confidential communications of Mr. Burr was all that he meant to aſk the witneſs, and that, under the impreſſion that the evidence would ſhew a treaſonable deſign. If the Court will compare what this witneſs will ſay, with the teſtimony of Gen. Eaton juſt delivered, they will find a remarkable coincidence. Gen. Eaton ſtates that there was always in the mind of the priſoner a moſt intimate connection of the two projects of New Orleans and Mexico. The teſtimony of Commodore Truxton therefore bearing principally upon the Spaniſh provinces, and Gen. Eaton's bearing upon New Orleans, will certainly render the teſtimony to the point.

Mr. Wirt ſaid, although it might not ſo directly appear that the evidence pointed to the attack on New Orleans as in the indictment now before the Court, yet he hoped that the witneſs would not be interrupted in his relation. It was to be recollected that there were two indictments againſt Aaron Burr. Now the witneſſes had been ſummoned promiſcuouſly, and it was impoſſible for the proſecutor to know particularly what every perſon would prove. When aſked, Commodore Truxton anſwered that his evidence related only to the expedition againſt Mexico, which certainly relates only to the indictment for miſdemeanour: but ſurely it is not poſſible, in the preſent appearance of it to ſay how far it may be connected with the charge of treaſon. The examination ought to be free and compleat.

Mr. Hay. In order to prevent the introduction of any evidence but what relates to this ſcheme, I will aſk you, Commodore Truxton, whether you had not ſeveral converſations with the accuſed, relative to the Mexican expedition, and what they were?

Commodore Truxton.—About the beginning of the winter of 1805-6 Col. Bur returned from the weſtern country, and ſeat of

* Teſtimony of General Eaton continued, September 26, to which date the reader is referred.

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government to Philadelphia. He frequently in converſations with me mentioned the ſubject of ſpeculation in weſtern lands, the opening of a canal and the building of a bridge. Theſe converſations were not intereſting to me in the leaſt, and I did not pay much attention to them. Col. Burr obſerved to me that he wiſhed me to get the navy of the United States out of my head; that he had ſomething both honourable and profitable to propoſe to me. I conſidered this nothing more than a deſire to get me intereſted in land ſpeculations. Theſe converſations were repeated frequently: and ſometime in July, 1806, he obſerved that he wiſhed to ſee me unwedded from the Navy of the U. States, and not to think more of thoſe men at Waſhington. He obſerved to me that he wiſhed to ſee me, or to make me (I do not recollect which) an Admiral, for that he contemplated an expedition to Mexico, in the event of a war with Spain. I cannot be certain which it was, whether *see* or *make* me an Admiral; but he ſaid he thought a war with Spain inevitable. He aſked me if the Havanna could not be eaſily taken in the event of a war.—I told him that it would require the co-operation of a Naval force; he obſerved that *that* might be obtained. He purſued the enquiry as to *Carthagena* and *La Vera Cruz*, what perſonal knowledge I had of thoſe places, and what would be the beſt mode to attack them, by Sea and Land. I gave him my opinion very freely. Mr. Burr then aſked me if I would take the command of a naval expedition. I aſked him if the executive of the U. States was privy to, or concerned with the project. He anſwered me emphatically that he *was not*. I aſked him that queſtion becauſe the executive had been charged with a knowledge of Miranda's expedition. I told Mr. Burr that I would have nothing to do with it; that Miranda's project had been intimated to me, and I had declined having any agency in thoſe affairs. Mr. Burr obſerved that, in the event of a war, he intended to eſtabliſh an independent government in Mexico, that Wilkinſon, the army, and many officers in the navy would join. I told Mr. Burr that I could not ſee how any officer of the United States could join; he ſaid that Gen. Wilkinſon had projected the expedition, and that *he* (himſelf) had matured it, and that many greater men than Wilkinſon were concerned, or would join, and thouſands to the weſtward.

Mr. Hay. Reflect for a moment on the ſubject—Do you recollect aſking him whether Wilkinſon could *certainly* have engaged in ſuch a ſcheme?

Witness. Yes. He ſaid, Yes, he had; and many greater men than Wilkinſon.

Mr. Hay. I will aſk you, Sir, whether at that time you were in the ſervice of the U. States?

Witness. I was declared not to be.

Mr. Hay. I wiſhed not to wound your feelings, Commo-

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dore, by my queſtion. It was merely asked to account to the Jury for the invitation given by the priſoner to *you*. Did you feel ſomewhat hurt at this declaration? *A.* I certainly was hurt.—Mr. Burr asked me if I would write a letter to Gen. Wilkinſon? that he was about to diſpatch two couriers to him. I told him that I had no ſubject to write to Wilkinſon about. Mr. Burr obſerved that ſeveral officers would be pleaſed to be under my command. He ſpoke highly of a Lieutenant Jones, and asked me if he had ever failed with me. I told him he had not; I could give no account of Mr. Jones; I did not know that I had ever ſeen him. Mr. Burr obſerved that the expedition *could not fail*—that the Mexicans were ripe for a revolt; and that he was incapable of any thing like chemerical, or that would lead his friends into a dilemma. He ſhowed me the draft of a Periogue, ſuch as plies between Powles' Hook and New-York, and asked my opinion of the conſtruction of thoſe boats. He asked me whether they were calculated for the Miſſiſſippi, and the waters running into the Miſſiſſippi river. I gave him my opinion that they were. He asked me whether I could get a naval conſtructor to make ſeveral copies of the draft. I ſpoke to a naval conſtructor, but he could not make the draft as ſoon Mr. Burr wiſhed, ſo the draft was returned to him. Mr. Burr told me that he intended theſe boats for the conveyance of agricultural produce to market at New Orleans; and, in the event of a war, for tranſports. I knew that they were not calculated for tranſports by ſea, nor were they for carrying guns. But having determined to have nothing to do with the Mexican projects, I ſaid very little more on the ſubject of theſe boats. But I recollect very well that in my laſt converſation with Mr. Burr, which I believe was towards the latter end of July, I told him, that there would be no war with Spain. He ſeemed to be very ſanguine that there would be a war. He ſaid however, that if he was diſappointed in a war, he was about concluding, (or had concluded, I cannot be ſure which) a bargain for a large tract of land on the Waſhita, and that he intended to invite his friends about him to ſettle it. He ſaid that in one year he ſhould have a thouſand families of reſpectability and faſhion, and ſome of them of property, and that they ſhould have a charming ſociety—that in two years they ſhould have double that number. And that, being on the frontiers, he ſhould be ready to move whenever a war took place.

I have endeavored to relate the ſubſtance of the converſations which I have had with Col. Burr, and indeed as nearly verbatim as the diſtance of time will enable me to recollect.

Mr. Hay. Pleaſe, Sir, to ſay whether theſe converſations between the priſoner and yourſelf took place after your declaration to him of your being no longer in the ſervice of the United States? *A.* The whole of them took place after that, I obſerv-

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ed in last July that there would not be a war; Mr. Burr replied that there would be a war. I did not think myself that there would be a war, although I saw great cause of war.

Mr. M'Rae. Did he speak of Gen. Eaton in any of these conversations?

Witness. I do not recollect that he did. Nay, I am sure that in all the conversations that he held with me he spoke of only Mr. Jones and Gen. Wilkinson.

Mr. Hay. Had you expressed your dissatisfaction at the usage of the government towards you among your friends; and about your being out of the service?

Witness. I did. *Q.* There were some publications on the subject, were there not? *A.* Yes there were.

Juror. I think you said you had three particular conversations with Mr. Burr?

Witness. Yes, Sir; one the latter end of 1805, another in July 1806, and another at the latter end of the same month of July.

Mr. Hay. Were you in the Navy at the latter end of 1805?

Witness. No, the first of my differences with the Secretary of the navy took place in March 1802. *Q.* In July 1806 he began to talk to you of an old topic of Land speculations—but before that time he disclosed to you the Mexican project? *A.* Yes.—*Q.* You do not speak of the precise number of conversations held with Mr. Burr? *A.* No, I do not: there were several; I saw Mr. Burr frequently.

Mr. M'Rae. It was in November, 1805, that he wished you to get the navy of the U. States out of your head; and in July, 1806, that he wished you were not so *wedded* to the navy of the U. States; for he wished to make you an admiral.

Witness. Yes. He observed that after the expedition against Mexico was compleated, that he intended to provide a formidable Navy, and that he wished me to be the Admiral. *Mr. Hay.* The accused stated to you that he himself intended to provide a formidable Navy; where were they to make their attack, at Mexico, or where? *A.* He said that after he had compleated that expedition, he intended to provide a formidable Navy. *Q.* Well. Did he inform you where the Navy was to come from? *A.* No: for having declined any connection, I did not ask him where the Navy was to come from, and he did not tell me. He asked me the best mode of attack by sea and land.

Mr. M'Rae. Did he not talk of a naval expedition against Havanna? *A.* I told Mr. Burr that Havanna could not be taken without a naval force; he said that could be obtained.

Cross Examination.

Mr. Burr. Early in your relation, Sir, you mentioned that many officers of the army and navy would join. Did I speak of it as expected to be, or that I knew of such assistance?

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Witness. I think you said that Wilkinson, the army, and many officers of the navy *would* join. Q. Do you recollect when I mentioned the name of lieutenant Jones, I said whether I had ever seen him or not? A. I do not know: you spoke highly of him. Q. Do you recollect my stating to you, that in the event of a war, private expeditions were lawful, proper and useful; and that I gave you many instances in the late war to shew that there was no restraint upon private enterprise?

Mr. Hay wished the Commodore to be instructed that questions of that nature are not to be put, as they were intended for the Jury rather than for the Court.

Mr. Burr. In cross examinations this is right. Q. Was I not intimately acquainted with your controversy with government long before that? A. Yes. Q. Did I not tell you that there was no sort of intention to take you into the navy; for, that you were duped by the Smiths and others? A. Yes. Q. Did not this sort of conversation occur between us almost daily? A. Yes. Q. Was it not on these accounts that I wished to get the navy out of your head, and to think no more of those folks at Washington? A. Yes, I think it was. Q. Did we not use to meet very frequently? A. Yes. Q. Well, did I not often speak of this land project? A. Yes. Q. Had we not previous to that, been on terms of intimacy? A. Yes. Q. Was there any sort of reserve between us in the communication of our views? A. No reserve at all. Q. Did I ever speak of dismembering the Union by separating the Western country or of seizing on New-Orleans? A. Never; and I have spoken it a thousand times. Q. Did I not rather speak of conferring benefits to this country, if I should take Mexico; and that I should take a pleasure in promoting the common interests of my country? A. Yes, you did express a wish to be on terms of good understanding with this country. Q. You have mentioned the periogues, you said, I think, that they were not fit for military purposes? A. Yes, I recollect you said that they were to go to the market at New-Orleans; and that, in the event of a war, they would do for transportation. Q. Was that laughingly or not? A. I do not know: I know that they could not be used at sea. Q. Had you any reason to doubt that I was not seriously designing to settle on the lands, in case there was no war? A. I took this to be your intention, in case there was no war? Q. Had I reason, do you think, to believe, that from the disposition you manifested, in case there had been a war, and this government should have countenanced the expedition, you would have joined it? A. I would have got out of my bed at 12 o'clock at night, if my services were wanted, against England, France or Spain, at any time.

Mr. Hay. I think that you stated that these periogues were calculated to navigate the Mississippi and to trade to New-Or-

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leans, by which commerce might be extended to moſt parts of the world. A. Yes. Q. Did the priſoner during any of theſe converſations, ſpeak of any commercial ſpeculations, in which he was about to engage, or of forming any commercial eſtabliſhments? A. He ſaid that commercial ſpeculations might be carried on to advantage, but he never ſpoke to me about any commercial eſtabliſhments. He ſpoke to me of the ſettlements on the Ouachita lands; and ſaid that country would grow into importance in a little time: and that there might be raiſed immenſe agricultural produce, which could be carried down to New-Orleans and ſhipped to all parts of the world.

Mr. Wirt. When he ſtated that he wiſhed to be always upon terms of good underſtanding with this country, did you underſtand him to ſpeak reſpecting his eſtabliſhment of an independent empire at Mexico? A. I did underſtand him ſo.

Mr. M'Rae. You ſpoke of converſations reſpecting the treatment of the Smiths, &c.

Witneſs. This was frequently the ſubject of converſation, and I thought I was uſed ill by the government, but I did not ſo much blame the Smiths for it. Mr. Burr thought otherwiſe, he thought that was the ſource. Q. Did he not often introduce that converſation himſelf? A. Sometimes I did; ſometimes he did.—Q. Were his remarks ſeemingly of a nature calculated to fill your boſom with reſentment, or were they of another character? A. I was pretty full of reſentment myſelf, and he accorded with me in ſentiment on that point. Q. You ſpoke of Wilkinſon's co-operation, and you ſpoke of Mr. Burr's aſking you to write to gen. Wilkinſon. On what ſubject do you ſuppoſe he wiſhed you to write? A. Mr. Burr never ſpoke of any ſubject; he knew that gen. Wilkinſon and myſelf had been upon very good terms, and therefore, I ſuppoſe it was merely to keep up a correſpondence. I told him I had no ſubject for a letter. Q. Could an attack by ſea be made upon any part of the Spaniſh dominions, from any part of the United States ſo effectually as from New-Orleans? A. An expedition might be carried on from any part of the Atlantic States, and from New-Orleans. Q. But ſuppoſe there was to be a war, would not an expedition by land and ſea from New-Orleans take the moſt effect? A. New-Orleans would be a very proper place, or indeed any other port for an army to take ſhipping. But ſhips of large draught of water could not come up to New Orleans.

Mr. Burr. Is it poſſible to carry on a naval expedition from New-Orleans—can you get large ſhips up there; or if they get up, can you get them out again?

Witneſs. No, Sir.

Mr. Hay. Suppoſe an expedition to be fitting out in the weſtern country, over the Alleghany, deſtined for inſtance againſt La Vera Cruz; could there be any place ſo proper for it to de-

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part from as New-Orleans? A. No, there could not; but ſmall craft muſt take the expedition down.

Mr. Parker (one of the Jury). Did you underſtand for what purpoſe thoſe two couriers were to be ſent by Mr. Burr to gen. Wilkinſon?

Witness. I underſtood that there was an underſtanding between them reſpecting the Mexican project. Q. Did you underſtand that it was to go into operation only in the event of a war? A. Mr. Burr expreſſed that on every occaſion. Q. Did you underſtand that any preparations were made or to be made, if there was no war? A. No, I did not.

Mr. Burr. Are there not preparations now making, within your knowledge, in contemplation of a war with Great-Britain? A. There are in New-York, Sir. Q. Have you not ſeen, that in anticipation of a war in Europe, they build veſſels and prepare for enterprize? A. Yes, enterprizing men in Liverpool, put ſhips on the ſtocks deſigned for privateers, in Liverpool, whenever they apprehend a war; and if there ſhould be no war, then they are uſed as Guineamen.

Mr. M'Rae. But this is done openly I ſuppoſe. Is it not done openly in New-York, and a matter of notoriety? A. Yes, Sir, always. Q. Have you heard of any perſon there who is to take the command of a navy in caſe of a war, independent of the government? A. No, Sir.

Mr. Botts. Ships cannot be built ſecretly, in the corner of a room.

Mr. Hay directed a number of witneſſes to be called, who did not appear to the call. He lamented that it was not in his power to keep up that train of evidence which the proſecution had pointed out to themſelves to bring forward. Some of the witneſſes were invalids, and ſome were negligently abſent, occaſioned by that evident uncertainty of when they would be called.—It would be neceſſary therefore to ſtep out of the deſired courſe. But as it was a late period of the day, perhaps it would be as well for the Court to adjourn, and to-morrow the witneſſes may appear in their order.

Mr. Wickham, begged leave only to ſay that it certainly was deſirable that this caſe ſhould be ended *some* time or other.—From the mode which the counſel on the other ſide had adopted, which ſeemed to be ſanctioned by the Court, he could not pretend to foreſee how many *months* (even) might be conſumed, and to no purpoſe. For it really muſt be evident that two hours had now been conſumed in the examination of commodore Truxton, who had not ſaid one word that affected the charge in the indictment.

Mr. Hay. Then I will go on at all events.

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PETER TAYLOR's *Evidence.*

Mr. Hay. Tell the Court what you know of the circumstance at Blannerhaſſet's iſland.

Witness. The firſt information that I got of this piece of buſineſs was from Mr. Blannerhaſſet, about Mr. Burr, Mr. Alſton and his lady, coming down the river to Kentucky.

Mr. Botts objected to this mode of the evidence being given. Taylor has been put up where he now ſtands for the purpoſe of telling his ſtory in his own way. We have no objection to Taylor's telling any thing he knows concerning col. Burr, or any act on Blannerhaſſet's iſland; but if he tells his own ſtory in his own way he will tell a vaſt deal of what came from Blannerhaſſet and his lady. If Mr. Hay will not accommodate us in ſtating what the witneſs is expected to prove, we ſhall be under the neceſſity of applying to the Court for direction.

Mr. Hay. The witneſs will prove the direct connection between Burr and Blannerhaſſet, and their connection with the crime itſelf. It is very difficult however for me to ſtate the particulars of his evidence. (To the witneſs.) State every thing that you know.

The people got much alarmed about the buſineſs, and Mrs. Blannerhaſſet ſent me with a letter to Mr. Blannerhaſſet, to prevent colonel Burr from coming back to Blannerhaſſet's iſland. Well, I went to Chillicothe, where I was directed, and I enquired for him, but he had not been there. Then I went on till I got down to Cincinnati; my orders were to call on Mr. John Smith, who lived there and kept a ſtore. I went to the ſtore, and I ſaw his ſon. I asked if Mr. Smith was at home; he anſwered he was. I ſaid I wiſhed to ſpeak to him. He went and told Mr. Smith that there was a man who wanted to ſee him. He came out from the other ſide of the houſe, and I enquired of him for colonel Burr and Mr. Blannerhaſſet; whether he could give any account of them: He ſaid he knew nothing at all of either of them; he allowed that I muſt be miſtaken, for that he was out of the place. I ſaid this muſt be the place, I am ſure, "Mr. John Smith, Cincinnati, ſtorekeeper." Said I, "Sir, do you not recollect a young man coming here two weeks back for Col. Burr's top coat (great coat)?" I ſaid, "Sir, I have lived with Mr. Blannerhaſſet theſe three years." When Mr. Smith found where I came from, then he took me thro' the houſe, and up ſtairs, to talk with me. He wanted to know what was the news up our way. I told him that our people was greatly alarmed. Then he wanted to know what was paſſing? I told him the conſequence; I told him what information Mrs. Blannerhaſſet gave me, and that they were going to ſettle ſome lands, and to make a new ſettlement. He ſeemed to be ſurpriſed; he asked me whether there was any thing ſaid about gen. Wilkinſon our way. I told him that I did not know a word. It was a new thing to me at that

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time. He asked me then, if I would carry a letter to Mr. Blannerhaſſet for him. I told him that I would carry any thing if it was not too burthenſome; he began then to write a letter. He asked me then if I would have any thing to drink, I told him I would; he chaſtiſed (charged) me not to go to a any tavern, ſuppoſing that the people would want to know my buſineſs, as he ſaid the people was catching at every word that was paſſing, and they would be ſifting me, as I was a ſtranger; he then ſhewed me the ſtable of a tavern where I might go and get my horſe fed; but told me not to go into the houſe. Accordingly I did it. I asked him where he expected I ſhould find Mr. Blannerhaſſet and Col. Burr; he ſaid in Kentucky, he ſuppoſed at Mr. Jourdan's, in Lexington. I told him I ſuppoſed I ſhould, becauſe I had been there before. He gave me the letter, directed to Mr. Jourdan's, in Lexington. When I got there, it might be about one o'clock on Saturday. Mr. Jourdan happened to be on the outſide of the ſtreet, talking to a gentleman; he knew me and come to me; he began to ſay to me "Peter, your old maſter, as you call him, is not in town now," (before I asked him.)

Cb. Juſtice. Who did he mean by "your old maſter?" A. Mr. Blannerhaſſet. But he ſaid that he expected him in, either that night or to morrow; he began to enquire what was the news in our parts: I told him—he ſtopped and talked ſome time; he asked me what I was to do with my horſe; he ſaid he would ſend him to the livery ſtable by his black boy. Well, after he had done talking he went up ſtairs to Col. Burr (as I ſuppoſe), and after being there a ſhort time, he beckoned to me to come up with him; I went up ſtairs with him by the motion. When I went into the room, there was col. Burr—he began to know what was the news in our parts. I began to tell him that my buſineſs down there was to prevent col. Burr coming back with Mr. Blannerhaſſet to the iſland.

Mr. Hay. Did you know col. Burr at that time? A. No, I did not; he had been at our houſe, but I was ſick, and I did not ſee him. When I told colonel Burr, he ſays to me, "I am the very man that is involved in this piece of buſineſs," he therefore ſaid that I ought to tell him all I knew—I told him that if he was to come up our way, they would ſhoot him. That was my anſwer—and it would not be ſafe for him to come up our way. And from the heat and agonies of the people, I thought it was ſo, if they could get a chance, they would rather ſhoot him than let him alone, many of them. I told him what excuſe I had made—that I expected he was going upon a large tract of land to ſettle, as I was told by Mrs. Blannerhaſſet, but the people would not believe it; the people ſaid it was all a fib, for he had ſomething elſe in his head. Then colonel Burr aſked me what letter I had got. I told that I had two for Mr. Blannerhaſſet, one from Mrs Blannerhaſſet and another from John Smith. He allowed tha

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from John Smith, of Cincinnati, was for him, and asked me if I would be willing he should open it? I told him I expected it made no difference between him and Mr. Blannerhasset; so I handed it to him. He allowed that that letter was for him, and so he broke it open, and shewed me that in the inside there was a letter for himself. He asked me just what he had a mind, and talked to me sometimes. Then I went down stairs to take a look about the town.

Mr. Hay. Did you take the letter with you? *A.* No, I left it with him. *Q.* Did you see the direction of the letter? *A.* Yes, he held it in his hand and showed me; and said, "you see it is just as I said."

Juror. How was it directed? *A.* I do not know. *Q.* Can you read? *A.* Yes, a little. Well, I went about to some places. I went back to Mr. Jourdan's and asked him where I was to be, whether at his house or at a tavern? He said I was to go to a tavern and he would pay for me, so I went with him to one. He ordered them to let me have what I wanted to eat and drink, and a bed. Well. The next day Mr. Jourdan wished me to go to Millersburg: he said that Mr. Blannerhasset's saddlebags were left there. So I went: and I stopped here till Monday morning. I left the letter for Mr. Blannerhasset with Mr. Jourdan, supposing that he would return before I could come back. I got back on Monday, about one o'clock. Mr. Blannerhasset was then come, and was making preparations to go home. It got pretty near night before we were ready to start. We came 10 miles that night, and stopped at a tavern, it being after dark. We alighted off our horses, I went to see about the horses; Mr. Blannerhasset went into the house. There were some people drinking in the house: they wanted to know who he was, and what his name was. He told them his name was *Tom Jones*. So he came out again to me directly, and said that there was some people who wanted to know who he was, and I was to call him Jones, and be sure not to make a mistake. So he passed by the name of Jones, till we got to the Mudlicks. Then he told me I must call him by his own name, for he was known there. After that, he began to enquire for men. He enquired at every tavern and place, where he could get information, about young men.

Juror. What time was this? *A.* Some time in the beginning of October, 1806—I think it must be October, but I cannot be sure.

Mr. Burr. If the gentlemen on the part of the prosecution, have any date as to these things, I could wish them to state it.

Mr. Hay. I have not, that I know of.

Witness. Well: he began to enquire for young men: any likely young men: good orderly men—people who would be conformable to order and discipline; and that had rifles. He said that Col. Burr and him and many more of his friends, had bought

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800,000 acres of land; and that they wanted young men that would go and settle the land: that he would give any young man 100 acres of land, and find him provisions and grog down the river, and find him three months provisions when they got to the end, if they would go with them. I myself agreed to go, upon the same footing, in case I could take my family with me. But he said he could not say about my family: he must have further consideration upon that. Every young man that was to go, was to find himself in a rifle and blanket. I then asked what kind of seeds we should take along with us: he said that we had no need to take any thing; we could get that there.

Mr. Wirt. What is your profession with him? *A.* A gardner. *Mr. Wirt.* I put this question that the Jury might understand his last observation.

I urged that to him several times, and told him that a few kinds of seeds would be best. Well. He made then a full stop. Then he said, "Peter, between you and me, we are going down to take Mexico, one of the finest and richest places in the whole world."

Juror. Was this observation made on the road? *A.* Yes.—He said that Col. Burr would be the King of Mexico, and Mrs. Alston (his daughter) would be the Queen of Mexico, whenever Col. Burr died. He said that Col. Burr had made fortunes for a great many in his family, but never had made any thing for himself, but now was going to make something for himself. He said that they would have all their friends in the Spanish dominions: he said that there was not, then, less than 2000 priests who were signed into the corps, and he made it out that these 2000 priests, and the societies that belonged to them, was a very strong party, when once he could get to join them. He said the Spaniards were like the French: that they were tired of their government and were going to swap (change) it. He also told me that the British were friendly in this piece of business. He asked me if I could not like to go to England: he told me that the English were joined in it, and were friends in this piece of business; and he was the man that had to go to England about this piece of business himself. I told him that I did not want to go to England, only to see my friends. He allowed that he had been the greatest friend to Col. Burr in this piece of business; more than all in the world besides him. Then when he had told me that, I asked him what was to become of the men that was to go to settle the lands he talked about: were they to stop at Red river, or were they to go on? He said that we should see that when they got them further down the river, every man that would not go, and conform to all the discipline and order he would stab them, by God he would, and that was the way to bring them to: and he lifted his hand and repeated, they would stab them, by God they would. I said to him, "Sir, I am no soldier for my part." He said that he did not want *me* to fight, but he wanted me to go and

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five with Mrs. Blannerhaſſet and the children, either at the Natchez or ſomewhere, while they went on their rendezvous. Well: I at him again: I told him that the people had got a tale in their heads that he was going to divide the Union. He ſaid that Col. B. and he could not do that themſelves: all that they could do was to tell the people the conſequence of it. He ſaid that the people of the Weſtern Country at this time paid upwards of 400,000 dollars a year, and never received any benefit from it. He allowed that money would be a fine thing in this damned wooden country to make locks at the falls of the Ohio; build bridges, and repair the roads. Well when I had been at home about two weeks, he ſent me to Dr. Bennett's to requeſt him to ſell him the arms belonging to the militia of the United States,

Juror. Did you take a letter for that purpoſe?

Witneſs. Yes I took a letter: he read it to me twice over before I ſtarted. Dr. Bennett lives in Maſon County, Virginia. He wanted to know if he could ſell the arms and keep himſelf out of danger, and he would give him a draft upon his friend in Kentucky for payment—and if he could not ſell them without hazard or danger, he muſt let him know where they were kept, and he muſt come and ſteal them in the night, and a boat would be ready to receive them. I carried the letter and delivered it to Dr. Bennett, who when he had read it was to deliver it back again to me; as I was directed to take it back again and burn it. I was told not to deliver it without he would deliver it back (becauſe it was high treaſon) and I was to burn it. I did receive it back and did burn it.

Mr. Hay. Were you not upon the iſland when the people were there? *A.* Yes. *Q.* How long did you ſtay upon the iſland after that? *A.* I cannot juſtly tell you, but I can tell you the time that the boats ſtarted. The boats that came down from Blannerhaſſet's iſland came of a Saturday night. *Q.* What boats? *A.* Why the boats that Comfort Tyler had the command of: I do not know whoſe boats they were: they went off again on Wedneſday night: it was the 10th of December they came, and the 13th at night they went away. *Q.* How many were there? *A.* There were four. *Q.* How many men do you think there were? *A.* I believe there were upwards of 30: but there were many more who did not belong to the boats, ſo that I could not particularly tell: I was buſy all the time. *Q.* What were the men employed about that did not belong to the boats? *A.* Some were packing up meat, and ſome packing up other things. Perhaps in all there were 50.

Juror. What did they come on ſhore for? *A.* Why, to wait for thoſe other boats coming down from Marietta. *Q.* Did they ſay that was their object? *A.* I know that was their object: for they ſent people to Marietta to tell them to take care, and to make haſte.

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Mr. M'Rae, Who went off on Wedneſday night? *A.* I do not know—there was Comfort Tyler, Mr. Blannerhaſſet, and a great many others; I do not know who.

Juror. Did all theſe men go with them? *A.* All except one and he was ſick: he had his lady with him. *Q.* What time did they go off? *A.* About one o'clock in the night.

Mr. Hay. Did you ſee any guns? *A.* Yes they had ſome, but I do not know how many: they went a ſhooting ſome of them. *Q.* Did they go backwards and forwards to the houſe while they were there? *A.* Yes: I ſuppoſe that neither the houſe nor the boats were ever free of them: they were always moving. I did not ſee many guns, I was ſo buſily employed all the while they were there.

Juror. Were they ſuch guns as they uſe in that country? *A.* I do not know: I know only that they were guns.

Mr. M'Rae. Did you ſee piſtols or dirks or any ſuch thing? *A.* No, I did not. I never was in the boats but by candle light. *Q.* Were there any guns at Blannerhaſſet's houſe? *A.* No; not of any account; only about a couple of his own. *Q.* Had they any powder? *A.* Yes, they had powder and lead to caſt balls. *Q.* How much powder did you ſee? *A.* Why the powder was in a long narrow barrel, like a churn: I was ſo buſy that I could not tell you how many balls were run, I believe they run a good many. *Q.* Did you know what it was that induced them to leave the iſland at that hour of the night? *A.* Why I believe it was becauſe they were informed that the Kenhawa militia were coming down. *Q.* What did you carry down to the boats? *A.* I took half a buſhel of candles, and a caſe of Brandy; but there were a great many things carried down to the boats that I know nothing about; there was a great many boxes carried down; but what were in them I do not know. *Q.* Were you on the ſpot when the party made this rapid retreat? *A.* Yes, I was: they held council at the foot of the pier, which was the beſt way to go, whether by land or water. Mr. Blannerhaſſet and Mr. Tyler once concluded that they would go by land and be met by horſes: another time they talked of going down by themſelves in the canoe: I adviſed them "beſt ſtick together." At laſt they all agreed to ſtick together, and go off in a body. Mr. Blannerhaſſet then told me to take charge of the ſetting poles, for they had not taken them. *Q.* Why do you ſuppoſe they went all in a body? *A.* For their greater ſecurity: when they were going. Mr. Blannerhaſſet wanted to ſee his two black men, but they were run away down to the barn I found when I got to the houſe. Mrs. Blannerhaſſet told me to go down to the boats and tell them to get off directly: they went off in a great hurry. Mrs. Blannerhaſſet went down, and there was Gen. Tupper and Mr. Woodbridge there, who went up with her, one on each ſide, up to the houſe.

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Croſs Examination.

Mr. Wickham. Did you ever ſee Col. Burr at the iſland? *A.* No. *Q.* Was he there at all that night? *A.* No, he was not that I know of. *Q.* Did you underſtand that he was in that part of the country at that time? *A.* No I did not.

WEDNESDAY, Auguſt 19, 1807.

Teſtimony of Gen. JOHN MORGAN.

Mr. Hay. Be ſo obliging Sir, as to tell the Court and Jury what you know of the priſoner's conduct, reſpecting the charge in the indictment.

Gen. Morgan. Sometime in Auguſt laſt (this time twelve months) my father put into my hands a letter ſent by Aaron Burr, in which he mentioned that himſelf, and his friend Col. Dupieſtre intended to dine with him the next day. My father requeſted me to go with my brother to meet Col. Burr on the road, and conduct him there. We met them about 7 miles diſtance. After a few words of general converſation, Col. Burr obſerved to me that the union of the ſtates could not laſt long: that a ſeparation of the ſtates muſt take place, and that in the courſe of four or five years, as a natural conſequence. He made many enquiries of me relative to the county of Waſhington generally, and reſpecting the ſtate of the militia pointedly; he aſked me reſpecting their diſcipline, arms, accoutrements, diſpoſition, character of their officers and a number of other things which I do not at this diſtant time recollect: But after riding ſome diſtance, we met with one of my workmen: a good looking likely young fellow: Col. Burr mentioned to me that he wiſhed he had 10000 ſuch fellows. At my father's table during dinner, Col. Burr obſerved again that a diſſeverment of the union muſt inevitably take place in leſs than five years. Several anſwers were given to it. I recollect my father (I think it was him) ſaid "God forbid?" In the courſe of converſation, Col. Burr obſerved that with 2 or 300 men he could drive the Preſident and Congreſs (or put them) into the Potowmac; and that with 4 or 500 he could take poſſeſſion of the city of New York. After dinner Col. Burr walked out with me and my brother; and after ſpeaking much in the ſame way, he aſked me if either of my brothers had a military turn; he ſaid he ſhould like to ſee my brother George, who was a fine ſtout looking fellow, at the head of a corps of Grenadiers. Theſe obſervations were made on our return from the mill, where my brother George was.

Theſe circumſtances induced me to ſpeak to my father. I told him to be aware, for that in the courſe of that night I was induced to believe Col. Burr would ſeek an interview with him: and I had no doubt but ſomething was going on, but what, I did not know. But I thought he would ask for my brother Tom to go with him. My words to my father were, that he would make

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a requisition for him to go. The next morning I rode with Col. Burr as far as the town of Washington 9 or 10 miles off: during which we had much conversation, most of which related to the militia of the county; he pointed out the necessity of citizens attending to military dicipline; and mentioned the advantages of it. He said that in New York, the exertions and influence of a single individual (Mr. Swartout) had brought about a discipline in the militia superior to any in the country. Mr. Burr asked me if I thought I could raise a regiment in Washington county, whether I could raise one with more facility and ease in New Jersey, where I had lived. Much other conversation of the same nature took place. When we arrived at Washington, Col. Dupiester, Col. Burr and myself took a walk down the town. I pointed out to them the house where Mr. Bradford lived, who had been at the head of the western insurrection. He made some enquiries where he was, and expressed an inclination to see him: he asked me if I knew any thing about his son. Mr. Bradford himself I think was at Baton Rouge on the Mississippi. Mr. *Burr* mentioned to me that he had met with several persons who had been concerned in the insurrection; one he named particularly, in the North Western territory, but the name I do not recollect, nor ever did from that moment, but who had said that if he was to be engaged in another, it should not end without bloodshed. He was a major, and Mr. Burr said he was a fine fellow. I do not recollect any thing else. It was on these circumstances that I advised my father to appriſe the President of the U. States that something was going forward.

Mr. Hay. Did Col. Burr go farther to the westward?

Witness. I saw him leave Washington for Wheeling.

Mr. Wirt. Were the division of the union and military subjects the predominant features of his conversation? *A.* These subjects were very general—very indeed. *Q.* Were these topics continued long? *A.* No it never continued long: a mere question and an answer, and then another subject proposed: for the last conversation was in the course of a rapid ride. *Q.* Do you recollect his conversation as to Bradford's expedition. *A.* Yes, I recollect that he said Mr. Bradford was very incompetent to a measure of that kind; and that, in a case of that nature there ought to be a good degree of confidence in the leader. *Q.* Which Bradford did he speak of? *A.* The one who headed the insurrection. *Q.* What time in August was this? *A.* I think between the 20th, and 25th.—Perhaps the date of this letter (from the prisoner to your father) may shew? *A.* Yes that was the time (the letter was dated the 21st.)

Juror. Did Col. Burr make any farther remarks with respect to this major who said that if he was to be engaged in another insurrection it should not end without bloodshed? *A.* No, nothing that I recollect, only that he was a fine fellow, or something like it,

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Mr. M'Rae. Do you recollect the manner in which he spoke about that? *A.* Yes, from the impression on my mind, he seemed to approve of the enterprize.

Cross Examination.

Mr. Burr. You spoke of a letter received by your father from me; do you know whether your father had written any letter to me, inviting me to come to see him?

Witness. Yes. About a year before: which letter is yet unsealed. It is in my brother Tom's bureau at Pittsburg, and never has yet been opened as I know of. He did not know of your being in the western country till he received your note. *Q.* Do you not know that the message was communicated to me, and that it was the cause of my visit? *A.* No Sir. *Q.* Did your father make any communication to you of the conversation which I had with him, before we went to Washington? *A.* No, not till after my return. *Q.* Do you recollect my making enquiries about seminaries of learning; and of one that was projected in your neighbourhood; and recommending its encouragement; and of my being very minute on that subject? *A.* Yes, prefectly well. *Q.* You spoke of a major in the western country, how did that come out: was I narrating the incidents of my journey or how? *A.* You must recollect: I do not know. *Q.* Did this circumstance of the major, whoever he might be, come out in the course of lively conversation; did it appear to be any thing serious? or was it only narrating an incident? *A.* There was nothing very serious in the way: the relation was no more than that you had met with such a person, who knew much about the insurrection. *Q.* You were speaking of Mr. Bradford, did you not say that he was a noisy man? *A.* No, I only mentioned him merely as a lawyer. *Q.* Did you not mention him as a sort of a noisy demagogue? *A.* No, not to my recollection. *Q.* Did I appear to know Mr. Bradford, or any thing about him, or where his house was till you told me? *A.* You appeared to know that he was engaged in the insurrection, but I dont recollect you saying any thing about him till I pointed out the house to you. *Q.* Who were present at dinner at your father's on that day? *A.* My Father, Mother, Sister, Wife, Col. Dupiestre, Mr. Thomas Ewling, and my brother Tom.

Col. George Morgan (father to Gen. M.) was sworn: as he was commencing his testimony,

Mr. Burr rose, he said to make a few remarks applicable to the whole of these witnesses. He meant, by no means, to assent to enquiries or relation of circumstances which was so manifestly improper: he had not interrupted the witnesses, because he believed that to let them go on with their relation, although, in itself improper, would be the best way to save time: but he begged that his silence might not be received by the Court and Jury as a tacit consent. Distant circumstances in relation to time;

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converſations; (many of them with third perſons) mere ideas, and other extraneous things, all of which, in their proper place would merit ſome ſtrictures, but yet he preſumed the Court and Jury would diſtinguiſh ſuch things from evidence. He had hoped that the Court would ſtop ſuch things; for himſelf he ſhould permit it to go on under the aſſurance that the Court would interfere, ſo far (at leaſt) as to give ſome general inſtructions to the witneſſes.

Mr. Wickham. We wiſh to be diſtinctly underſtood on this ſubject. Col. Burr and his counſel have found it impoſſible to conduct the defence in the way they wiſhed. The Court have permitted the counſel for the proſecution to go on as they pleaſed. Were we to riſe on every occaſion where we ſee the neceſſity, we ſhould be charged with delaying the proſecution. That is not our wiſh, and we would rather ſuffer this inconvenience than that of delay. We conſider that the Court will not expect us to make any formal application or objections to ſuch impropriet ies as we have ſeen. But we expect that the Court and Jury will not thence infer our approbation to ſuch a courſe. We truſt the Court will interfere.

Ch. Juſtice. It is not in the power of the Court to know whether a witneſs is going wrong or not: it is impoſſible to ſee whether the teſtimony will be relevant or irrelevant: the Court have declared that every thing that relates to the intention to commit this overt act, is relevant. Although it may, at firſt ſight appear irrelevant, yet it is impoſſible for the Court to pronounce it ſo, becauſe it may introduce other modes which might be applicable. If the Court was to interfere and ſtop the witneſſes, ſaying, you muſt not give evidence upon this or that ſubject, it would produce infinitely more delay and interruption. Objections may hereafter be urged in the conſideration of the teſtimony, but the Court cannot, at preſent, ſtop it.

Mr. Hay. In a very little time the gentlemen will ſee that all this is applicable: and that all the evidence which we have brought, or ſhall bring, does lead to the grand ſcheme which the priſoner attempted to execute: We ſhall at length come to the very place where the whole of it did exiſt. We muſt confeſs however that our ideas of the manner of bringing out our own evidence may differ from thoſe of our opponents.

Mr. Lee. I underſtand the Court to have been very explicit. The explanation given by the Court is to be underſtood by the Jury thus: that the ſilence and non-interference of the Court is not to be regarded as any ſort of acquieſcence, as to the nature of the teſtimony, or the manner in which it is given; nor that it is free from objection. The Court have pronounced that the right is ſaved to the party to make objection at a future time.

Ch. Juſtice. No doubt of it.

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Col. GEORGE MORGAN'S *teſtimony.*

Col. Morgan. There has been a long acquaintance between Col. Burr and myſelf. He had introduced to my notice two of his nephews of the name of Pollock at North Carolina; clever young men, of fortune; and a third young man of the name of Edwards—Pierpont Edwards's ſon. He requeſted that I would pay them that attention which he would, on other occaſions ſhow to me. I received many civilities, in conſequence of it, from him at New York after that had paſſed. From which, I formed ſuch an attachment for Col. Burr, that I never ſhould have forgotten, had not this affair taken place. About three years ago, or perhaps ſomething leſs, Col. Burr was under a conſiderable degree of perſecution, and, as I thought unjuſt. He erred as I erred. I had a young ſon, who is now here with me, that was ſtudying law at Pittſburg. I wiſhed to introduce him to Col. Burr, hearing that he was there; and in conſequence of my friendſhip and reſpect for him, I wrote a letter to him, inviting him to ſpend ſome time and as much as was agreeable, with me. I did this principally becauſe I thought an unjuſt perſecution raged againſt him, and I wiſhed to afford him an aſſylum. This letter did not reach Col. Burr, as he had left Pittſburg: and I ſuppoſe it now remains in my ſon's ſcrutoire. On the 24th of Auguſt I received a letter from Col. Burr dated Pittſburg Auguſt 21ſt informing me that he ſhould dine with me on the next day.

Mr. Hay. Is this the letter? (ſhowing it.)

Witneſs. I never ſaw the letter from then till now, becauſe I encloſed it to the Preſident of the United States, in order to explain the matter that I then informed him about.—That is the letter he wrote to me. In conſequence of this letter, (which was ſent to me by a man, who called himſelf Count Willie; Mr. Burr called him one of his attendants, and who, after he had delivered the letter, went away,) I believe my ſon did not come that evening, but the next morning, after I had put it into his hands, I told him that out of my great affection for Col. Burr, I would pay him proper reſpect, and therefore requeſted that he and his brother would go out a few miles to meet them. I wrote a letter of introduction by them to him. What paſſed between them I know not, except what they told me. Col. Burr and myſelf were walking together, he mentioned Col. Dupieſtre as one of the firſt military characters of the age; and I was ſatisfied that he took an opportunity to talk to my ſon in the ſame way. I ſhall paſs over the incidents during dinner. As ſoon as the cloth was removed from the table I made ſome obſervations to Col. Burr what a fine country the weſtern country was, and that on my firſt going there, there was not a ſingle family, weſt of the Alleghany, between that and the Ohio: and that we ſhould have Congreſs ſitting bye and bye at Pittſburg, or near

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there. Theſe were my real ſentiments, and I have no kind of doubt upon the ſubject. "No," ſays Col. Burr, "never, for in leſs than five years, you will be totally divided from the Atlantic States." When I ſpeak of Atlantic States, it is to be underſtood that we, though over the mountains, conſider ourſelves as belonging to the Atlantic States. Then the Col. entered into ſome argument to prove why it would be ſo, and why it ought to be ſo. The firſt argument was the produce of the ſale of weſtern lands being carried over to a country (the Atlantic States) which had no right to it: and that we had no right to be tributary to them as we were. He mentioned our taxes as being very heavy, and aſked why we ſhould pay taxes to the Atlantic part of our States; at this time I made the obſervation that God forbid that there ever ſhould be ſuch a change in my time. I believe this obſervation terminated the converſation on that point. The next ſubject was reſpecting the ſtrength of government: the weakneſs and imbecility of the Federal government was inſiſted on.

Mr. Wirt. Who ſtarted that ſubject? *A.* Col. Burr himſelf. Whether I made any obſervations or not I cannot recollect; but I know it ſtruck my mind very forcibly; and I began to think that all was not right.

Q. Do you recollect any particular obſervation that he made on that ſubject?

A. Yes. He ſaid that with 200 men, ſo weak was the government, that he would drive Congreſs into the Potowmac, (or that it might be done) and the Preſident at the head of them. And alſo, that with 500 he could take poſſeſſion of the city of New York, or it might be done. He then appealed to Col. Dupieſtre if it could not be done, and *he* bowed his aſſent: his lips might have moved, I cannot ſay. There was a reply made to this by one of my ſons, that he would be damned if they could take our little town of Callonſburg with that force. Some ſhort time after this, the Col. went out of the room. In the middle of my houſe there is a paſſage which the door opens into. As he went out, he made a motion to my ſon Thomas, who did not perceive it, and nobody could interpret what the motion was for. However, he beckoned to him, and my ſon followed him. They went out and had ſome converſation; what that was he muſt tell himſelf. Soon after this a walk over to my ſon's mill was propoſed, and they went; what occurred there I do not know. When they came back, one, or both of my ſon's, (but I think it was only one) came in and cautioned me, ſaying that I might depend upon it that this night Col. Burr would open himſelf to me; and that he wanted Tom to go with him. After the uſual converſation, Col. Burr went up ſtairs, to go to bed, as I thought. My daughters and all the family were gone to bed: Mrs. Morgan was reading to me, as is uſual with us when the family have retired. After I thought Col. Burr had been aſleep

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an hour, my wife said to me, "Col. Burr is coming down stairs, you will have it now." (She had heard my son's conversation.) The Col. came down, with a candle in his hand. Mrs. Morgan immediately took her candle and retired. The Col. took a seat by me, and took out of his pocket a book; it looked like a memorandum book. After looking in it for some little time, he asked me if I knew a Mr. Vigo, of Fort Vincent, a Spaniard? I told him that I did: I had reasons to know. What those reasons were is not necessary to inform the Court, except so far as that I conceived him to have been concerned in what was called the English conspiracy in 88: I have reason to believe he was deeply concerned in it. I recollect in relating that, that I called it a *nefarious* thing to aim at any division of the States. I laid a strong emphasis on the word *nefarious*. On which Col. Burr closed his book and thrust it into his pocket. He saw who he had to do with, and therefore he said no more, but went up to bed. I believe I was very well understood by him. The next morning Col. Burr and Col. Dupiestre went away earlier than I expected, they did not stay even to breakfast. My son accompanied them out of town. Since that time I have not seen him nor heard of him, except by the papers, till I met him here. It may be proper to mention that it was the opinion of my son and his mother, with whom I agreed, that it would be proper to write to the President of the U. States, to advertise him of the circumstance, by which he might follow his steps.

Mr. M'Rae. Did the prisoner, after the conversation about Callonsburg at the table, draw any sort of comparison between the Eastern and Western States? *A.* He said "keep yourself on this side of the mountain and you will never be disturbed." By which I suppose he meant a separation of the union. There is another matter that I have always looked upon to be material, that escaped me. The Sunday after Mr. Burr left our house, the Judge of our Court called and dined with me, as he commonly did. I communicated all these circumstances to him; and requested him to mention the circumstance to Gen. Neville, and to the chief Justice (Tighlman) I wrote a letter to the General indeed, and invited him and some of the Judges (Tighlman and Roberts) to dine with me on the next Sunday on business of the first importance. Gen. Neville answered me that the chief justice would be engaged all the next week, and they would dine with me on the Sunday following. They did so. I recommended to them to be upon their guard. They all agreed to write a letter to the President of the U. States, jointly, informing him of what I had communicated to them.

Cross Examination.

Mr. Burr. You speak of my having come down stairs, in the night, are you certain that you were in the room, and saw me there, or did you hear it from somebody else?

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Witneſs. Mrs. Morgan was ſitting reading in the room, & ſaid to me, "now you will have it." *Q.* Was that book that I took out of my pocket, a bound book? *A.* I do not think it was: it was a kind of memorandum book. *Q.* Did I read any thing out of that book? *A.* You turned over the leaves, and aſked me for Mr. Vigo. I then mentioned the *nefarious* tranſaction. *Q.* What tranſaction, was it a ſeparation of the union? *A.* Yes, the word nefarious was applied to that. *Q.* You have mentioned a good deal of converſation that occurred at the table about dividing the union.—*A.* I have mentioned every thing that I recollect did paſs. *Q.* Were the ladies preſent—did they take any part in the converſation? *A.* They felt it. *Q.* You have mentioned about Congreſs ſitting at Pittſburg: was that a jocular part of our converſation? *A.* I had no doubt but it would be ſo. *Q.* Who were preſent with Judge Tighlman when he came to ſee you? *A.* Gen. Neville and Judge Roberts. *Q.* Any other perſons from Pittſburg. *A.* I am ſatisfied there were not: I had invited them for the purpoſe, and no body elſe. *Q.* The converſation at dinner you did not think any thing like confidential but jocular? *A.* My real ſentiments and views (whatever my manner might have been) were what I have ſaid to you. *Q.* Then you were ſerious at ſome times and not at others? *A.* I was always ſerious. *Q.* But you ſuppoſed that in a certain number of years Congreſs would remove there? *A.* No. I ſaid that when our population increaſed, we ſhould not be ſatisfied to go over the mountain for our laws. *Q.* I think you once lived on the Miſſiſſippi; did you go with a deſign to ſettle there? *A.* I did go there, with a view of ſeeing the place. It was with the approbation of my country, and of the Spaniſh government. There was another object, which was to diſtribute out lands. The place I went to was called New Madrid on the Weſtern ſide of the Miſſiſſippi. *Q.* How long did you live under the Spaniſh government? *A.* About 30 or 40 days, that was all. That was in the year 88. *Q.* Did you acquire any land there? *A.* I am told that I have acquired ſome. One thing I recollect, that I detected a Britiſh ſpy, who was glad to make his eſcape.

Gen. JOHN MORGAN called in by *Mr. Burr.*—*Q.* Do you recollect Judge Tighlman and other gentlemen coming to ſee your father. *A.* Yes. *Q.* What was the capacity of your father then, as to memory, or to give information? *A.* He was very unwell at that time. *Q.* Had you not occaſion to make apology to Judge Tighlman, as to the ſtate of his mind? *A.* I did tell Judge Tighlman that my father was an old man, that he was apt to forget perhaps, and that, like other old men he told long ſtories, and made repetitions.

Mr. M'Rae. Do you recollect the reply that was made by yourſelf or your brother after the mention of of the 200 men to attack Congreſs, and the 500 men to take New-York.

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Mr. Baker thought this was an improper queſtion: he wiſhed the Court to interfere.

Mr. M'Ras. My intention was only to aſk a queſtion upon the evidence already given in. Do you recollect whether, after that ſubject was mentioned, any thing was ſaid relative to the character of the people Weſt or Eaſt of the Alleghany mountain? *A.* I muſt confeſs that I felt myſelf ſomewhat hurt at the moment: I turned round and ſaid, "By God, Sir, you cannot take Cannonſburg with that force." Col. Burr ſaid, "Confine yourſelves on this ſide of the mountain," or ſome words to that effect. *Q.* When Col. Burr aſked you about raiſing a regiment, was there any anſwer made? *A.* Not a word.

Mr. Burr. Do you remember whether the probability of a Spaniſh war, was a ſubject of converſation? *A.* Yes, I think it was.

Teſtimony of THOMAS MORGAN.

On the evening of the 21ſt of Auguſt, my father received a letter from Pittſburg, by the hands of ſome perſon, the ſignature of which was Aaron Burr. In that letter the writer communicated his intention of dining with my father on the following day: he alſo mentioned that he ſhould take the liberty of introducing a friend. My father requeſted my brother and myſelf to meet him, which we accordingly did. Nothing of importance occurred during our ride in my preſence. Col. Burr was generally with my brother. Col. Dupieſtre was often with myſelf; and ſometimes we were promiſcuouſly together. Whilſt we were at dinner, Col. Burr, emphatically, as I thought, confidently and earneſtly ſaid, that we (meaning the people of the weſt,) would be ſeparated in five years from the Atlantic ſtates; the Alleghany mountain to be the line of diviſion. He ſaid that great numbers were not neceſſary to execute great military deeds; all that was wanting, was a leader, in whom they could place confidence, and who they believed would carry them through. This converſation occurred during dinner. He ſaid that with 500 men, New-York could be taken; and that with 200, Congreſs could be driven into the Potowmac.

To the laſt obſervation, my brother, I think, indignantly replied, "By God, Sir, you cannot take our litle town of Cannonſburg."—Col. Burr's reply to this obſervation was, "Confine yourſelf to this ſide of the mountain, and I'll not contradict you," or words to that effect. Col. Burr withdrew from the room where we dined; and on reaching the door leading into the entry, invited me, by a nod, to go out with him. When we had arrived at the back door of the entry, out of hearing of any other perſon, Col. Burr enquired what my purſuits were. I informed him I was ſtudying the law. He then ſaid, he was ſure I could not find employment for either body or mind; and he ſaid that there were,

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or asked, if there were not a number of young men in Pittsburg similarly situated. He said, that under our government there was no encouragement for men of talents; that John Randolph had declared on the floor of Congress, that men of talents were dangerous to the government. He asked me, how or whether I would like a military expedition, or life, I cannot recollect which. My answer was, that it would entirely depend upon the object or cause, for which I was to fight. I think previously or certainly soon after he said, "I wish you were on your way with me." After asking Col. Burr concerning a young man (Mr. Duer) living at New-Orleans, with whom I had a slight acquaintance, he said he was doing well; and he then spoke of Duer's brother, who was also doing well, as a lawyer, but that he had much rather be at the head of a military Corps. Mr. Morgan then proposed to state the steps which his father had taken to defeat A. Burr's projects, when he was stopped by the Court.

Cross examination.

Mr. Burr. Had you ever seen me before this time? *A.* Perhaps I did three years ago, but I never spoke to you. *Q.* Did you not relate to me, with some air of complaint, the neglect, or want of means to procure you such an education as was desirable? *A.* No. *Q.* Did I not seem to regret that that country did not possess more advantages of education? *A.* My recollection on that subject is very slight. *Q.* Did you not complain about wasting your time? *A.* I recollect nothing on that subject but your remark that I surely could not find employment for either body or mind. *Q.* Where were you studying law? *A.* At home.

Testimony of JACOB ALLBRIGHT.

Mr. Hay. Our object is to prove by *his* testimony, the actual assemblage of men on Blannerhasset's island. It goes of course to prove directly the overt act.

JACOB ALLBRIGHT. The first I knew of this business was; I was hired on the island to help to build a kiln for drying corn; and after working some time, Mrs. Blannerhasset told me, that Mr. Blannerhasset and Col. Burr were going to lay in provisions for an army one year. I went to the mill, where I carried the corn to be ground, after it had been dried. I worked four weeks on that business on the island.—Last fall (or in September,) after Blannerhasset had come home—he had been promising me money for some time.—I stept up to him. He had no money at the time; but would pay me soon. Says he, "Mr. Allbright, you are a Dutchman." But he asked me first and foremost, whether I would not join with him and go down the river. I told him, I did not know what they were upon, and he said, "Mr. Allbright, we are going to settle a new country." And I gave him an answer, that I would not like to leave my family. He said, he did

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not want any families to go along with him. Then he said to me, "you are a Dutchman, and a common man; and as the Dutch are apt to be scared by high men, if you'll go to New-Lancaster, where the Dutch live, and get me 30 or 40 men to go with us, I'll give you as many dollars." I went home then, and gave him no answer upon that. In a few days after the boats came and landed at the island. The snow was about three inches deep, and I went out a hunting. I was on the Ohio side. I met two men; I knew they belonged to the boats but I wanted to find out; and they asked me whether I had not given my consent to along with Blannerhasset down the river. As we were talking together, they named themselves Col. Burr's men, belonging to the boats, landed at the island. When they asked me, whether I had not consented to go down with Blannerhasset; I put a question to them. I told them I did not know what they were about; and one of the gentlemen told me, they were going to take a silver mine from the Spanish. I asked the gentlemen, whether they would not allow, that this would raise a war with America. They replied, no. These were only a few men; and if they went with a good army, they would give it up and nothing more said about it. I had all this conversation with the two men. These men shewed me what fine rifles they had; going down the river with them.—Then I went to the island, and Blannerhasset paid me off in Kentucky notes. People however didn't like these notes, and I went over to the bank at Kenhawa to change them. I got two of the notes changed; and one, a ten dollar note, was returned to my hand, for which I wished to get silver from Blannerhasset. I went to the island the day the Proclamation came out. But before I went to Blannerhasset's house, I heard that he was not at home, but at Marietta. I went on the Virginia side, where I met three other men, belonging to the boats, with three complete rifles. They made a call upon me, to take them to the island in my canoe, and I accepted (excepted) to it; but afterwards I carried the third man, who stood close by my canoe, over to the island. After being some time on the island, I went down to the four boats—Blannerhasset was not at home yet—and I met some of the boat people shooting at a mark. They had a fire between the bank and the boats. I waited at the house till Blannerhasset came home. He seemed very much scared. One of the men came up to ask him for something and he told him "Don't trouble me; I have trouble enough already." He went up to his chamber and I saw no more of him. I asked an old gentleman to go up to his chamber, and change my note for silver. He did go, and brought me silver. By and bye I heard they were going to start that night.—Thinks I, "I'll see the end of it." This was the night of the very day that Blannerhasset got back from Marietta. He got back before night. When night came on, I was among the men, and also

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In the kitchen, and saw the boatmen running bullets. One of them spoke out to the others, "Boys, let us mould as many bullets as we can fire 12 rounds." After that, I saw no more till after 12 o'clock at night.—Then Blannerhasset came down from the chamber; and called up some of his servants; he had four or five trunks. There were not trusty hands enough to carry them to the boats, and some person called out my name, and asked me to help them: and I carried one of the trunks and moved along with them. When we got down, some person, I don't particularly know, but I think it was Blannerhasset himself, asked me to stand by the trunks, till they were put in the boats. When the last of them went off, I saw men standing in a circle on the shore. I went up to them; perhaps they were five or six rods from me. The first thing I heard was, their laying plans how Blannerhasset and Comfort Tyler should get safe by Galliopolis. One Nahum Bent was called forward, and when he came, Blannerhasset asked him, whether he had not two smart horses. N. Bent answered, no; he had but one. Then Blannerhasset told him to go to Captain Dennie, and get his sorrel horse; and N. Bent told him, that the sorrel horse had no shoes on; and Blannerhasset said the roads were soft and would not hurt the horse. Blannerhasset told Nahum Bent to meet him and Comfort Tyler with the horses somewhere about Galliopolis: Bent enquired how he was to find him out: should he enquire for him? "No."—"Have you no friends there?" "No." Mrs. Blannerhasset then came forward, and she told Mr. Blannerhasset and Comfort Tyler, that they must take a canoe and get into it before they got to Galliopolis, and fall down the stream of the Ohio; for no body would mind two people going down the stream. She said, she'd pay for the canoe. N. Bent was told to meet them above Galliopolis about day-break, and then they might surround (go around) Galliopolis. Then a man by the name of Tupper, laid his hands upon Blannerhasset; and said, "Your body is in my hand in the name of the Commonwealth;" or such a word as that. As quick as Tupper made that motion, there were 7 or 8 muskets levelled down at him. Tupper looked about him, and said, "Gentlemen, I hope you will not do the like." A man next to me about two yards off, said, "I'd as lieve as not." Tupper then changed his speech; and said he wished him luck and safe down the river. Tupper before told Blannerhasset, he should stay and stand his trial. But Blannerhasset said no; the people in the neighbourhood were coming down next day to take him, and he would go. Next day after, I saw the Wood county militia going down. The people went off in boats that night about one. *Q.* All? *A.* All but one, who was a doctor. All had some kind of arms. *Q.* How many were there in all? *A.* About twenty or thirty; I did not however count them. Every man I saw had arms. *Q.* At what time of the year was this? *A.* I

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do not recollect the particular time. I recollect the year, but not the month. *Q.* Do you recollect whether it snows in September? *A.* I do not recollect.

Mr. Wirt. Had you seen Col. Burr on the island? *A.* Yes. *Q.* Was he there before Blannerhasset went to Kentucky? *A.* He was. *Q.* Did you speak of the boats under the command of Tyler? *A.* I did. *Q.* Did the boats quit the island, at the time of hearing the Proclamation? *A.* Yes. *Q.* Did the county militia go there next day? *A.* Yes. *Mr. Burr.* Did you see Peter Taylor converse with Blannerhasset that night? *A.* I do not recollect. *Mr. Wirt.* How long did A. Burr remain on the island? *A.* I do not recollect. *Q.* How long was he there before the departure of the boats? *A.* About 6 weeks.

Cross Examination.

Mr. Burr. Do you knnw Gen. Tupper? *A.* Yes. *Q.* Is that the person (pointing him out) *A.* Yes. *Q.* Did these people seem to have a mind to hurt him when they pointed their guns at him? *A.* No more than I stated. The gentleman that was next to me, who had a shot gun, told them that he would as soon do it as not. *Q.* Do you not recollect saying, on a former occasion, that they appeared as though they were exercising? *A.* Why I do not know: I can tell nothing but just what I state. *Q.* Were they on the water or on the land? *A.* On the land. *Q.* But was there nothing passed between their presenting the guns at Gen. Tupper, and their going on board of the boats? *A.* Yes, there might; I might have forgot some things. Last fall I could have told more.

Mr. Burr here made some remark on the subject of the witness's memory.

Mr. Wirt appealed to the Court to know if it was right for the prisoner and his counsel to make attempts at confounding a witness, or making reflections.

Mr. Botts remarked that such "improprieties" as the gentleman had termed them were generally permitted by the Court, on both sides, in order to test the truth of a witness's declarations.

Ch. Justice. It will be stopped when it shall extend too far, but in cross examinations it is generally permitted to a degree.

Mr. Burr. The law directs our course: they have a right to open their testimony; and I have a right to open my examination if I please, to the Jury. The object of cross examination is to degrade a witness if he merits it, and thus to invalidate his testimony. This witness will inevitably be degraded.

Mr. Wirt. I object to no proper mode of extracting facts in cross examination; but I do object to severe reflections, and attempts to confound, before a Jury, because its inevitable tendency is to prevent the *truth* from appearing.

Mr. Hay. It is said that the object of this cross examination

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is to degrade the witneſs, and it is confidently ſaid that it will be effected: one thing I can inform the Court, which is, that though this man may be a very ignorant man, yet he can be proved, by his neighbours to be a very honeſt man.

Mr. Burr. Ignorance is of the ſame nature as diſhoneſty in the hands of men who are artful. To the witneſs. Were you examined before you came here? *A.* Yes. *Q.* By whom? *A.* By Mr. Jackſon. *Q.* Had he a printed paper in his hand when he examined you? *A.* I cannot ſay. *Q.* Did he read from any paper? *A.* Yes, he looked at one. *Q.* Did he ſet down what you ſaid? *A.* Yes, moſt of it. I did not remember ſo much at that time as I did afterwards from conſidering it over. *Q.* What time was it that you began to remember? *A.* After I knew that I ſhould be called upon to give teſtimony. *Q.* How long was it before the men went on board the boats, after the guns were pointed at Gen. Tupper? *A.* I do not know. *Q.* Was it half an hour or what time? *A.* I cannot ſay. Any thing that I am not ſure of, I ſhall not anſwer to. What happened I believe was between 12 and one o'clock. *Q.* Had the men guns in their hands when they were running about? *A.* Not at that time: they were doing work. *Q.* Was Mrs. Blannerhaſſet there when the guns were pointed at Gen. Tupper? *A.* Yes, ſhe was in the circle at the ſame time. *Q.* Was Mr. Blannerhaſſet in the circle? *A.* Yes. *Q.* Was Tupper in the inſide of the circle? *A.* Yes. *Q.* Was Mr. Woodbridge there? *A.* I did not know him at that time. *Q.* After they got into the boats, did Gen. Tupper wiſh them good luck? *A.* No, that was in the circle. *Q.* What, did they appear then to be on friendly terms, and were civil to him? *A.* Yes, as much as I could ſee. *Q.* Did they appear to be good humoured? *Q.* Did they ſhake hands. *A.* I did not take notice of that. *Q.* How long had you lived with Mr. Blannerhaſſet? *A.* I worked there ſix weeks. *Q.* What time did you begin to work there? *A.* I cannot tell, I worked there four weeks and two weeks afterwards. *Q.* When do you ſay that you ſaw me there? *A.* I did ſee you there, but that was when I did not work there.

Mr. Burr. I beg leave to refer the Court and Jury to the time that I was at Mr. Morgan's as ſtated by them: it will be found that I went down to that country immediately. I ſtaid a ſhort time at Marietta, and that time was the laſt day of Auguſt or firſt of September, which was the laſt time of my being there.

Q. To the Witneſs. What was you doing there? *A.* I was working at the farm when I ſaw you there, though I was employing myſelf in catching fiſh, which I carried up to the houſe for ſale: that was the time I happened to ſee you there. *Q.* How happened you to be on the iſland at that time? *A.* I was there almoſt every day, before I worked there. *Q.* Do you recollect how long it was ago that I was there, and that you worked there? *A.* No Sir.

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Juror. How often do you recollect seeing Col. Burr on the island? *A.* Only once. *Q.* Do you know how long he staid there? *A.* No; I kept no account of any thing then. *Q.* Did you live in that neighbourhood? *A.* Yes within a mile of there. *Q.* How do you know that it was Col. Burr you saw there? *A.* They told me it was Col. Burr, and I knew it from seeing him here. *Q.* Did you see any powder with the men that were on the island? *A.* No.

Mr. Hay. Were you in the boats. *A.* I was not.

Mr. Burr. Do you know where Gen. Tupper lived? *A.* He lived at Marietta. (That is in the state of Ohio) *Q.* How long is it since you first knew him? *A.* Last fall. I never knew his name until that time. I have seen him often since.

Mr. Burr. I beg the Court and Jury to observe, that in the evidence this man gave on the motion to commit, (which was taken down by the Court, and now handed by the clerk) he says that he did not believe them to be in earnest when they pointed their guns. Now I think his memory must be very deficient, and I hope that circumstance will be regarded as an important defect in his testimony.

Witness. No I had no reason to suppose them in earnest, because I saw no quarrel. I did not know what they were after, and cannot tell any thing about it, more than what I saw: I heard no firing.

Mr. Wickham. Do you recollect saying before, that you did not think them to be in earnest.

Witness. That was a piece of my opinion; and that it is the fault of a man's giving his opinion without he knows a thing. *Q.* What is the reason for your now believing them to have been in earnest? *A.* I do not now say that they were in earnest.

Mr. Wickham. The witness states that he gave in his affidavit to Mr. Jackson: we call upon the counsel on the other side to produce that affidavit. If they say they have not got it, there is an end to it: but if they have got it, we trust that the Court will compel them to pruduce it. Whether the Court will or not is a question of some moment, because it may be called for in other instances. We think ourselves entitled to every means of detecting the accuracy of witnesses statements.

Mr. *Hay.* I have the paper, but I certainly do not choose that the gentlemen should have it. I have not the smallest objection on any ground of variance that would be disclosed by its production, but I object to it on the ground of impropriety: I see no reason why the gentlemen should thrust their hands into my port folio for private papers when they shall see proper. Unless the Court shall say that it ought to be done, I cannot submit to its surrender. The Court well know the object of the gentleman in asking for this paper: they will also recollect the purpose for which the affidavits were taken. I presume Mr.

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Jackſon was requeſted by the government, to enquire in the neighbourhood as to this tranſaction. He converſed with the witneſs, and obtained from him what he thought right, and then wrote it down: and perhaps not in his own words, but in the way of general memoranda. Now, Sir, will you ſay that ſuch an affidavit as this, which the circumſtance itſelf muſt prove to be in a crude ſtate, ſhould be brought into Court; Beſides, this was a circumſtance that happened before the witneſs's eyes: but Mr. Jackſon put it down in his own words, and whether accurately or not, is uncertain; for it was enough for him to know that this man would be a proper witneſs to the tranſaction.

Mr. *Burr.* I do not pretend now to call for the authoritative interference of the Court, to direct the gentleman to give the paper up at all events: but I beg that the Court would expreſs its ſenſe of the propriety of the meaſure, if it ſhould be deemed neceſſary: But if the Court ſhould not be inclined to recommend it, I ſhall ſave it the trouble by claiming my privilege. I think I have a right to it, and if I do not get it I ſhall take advantage of the refuſal. I mean to prove the deficiency of this man's recollection, in order to vitiate his evidence.

Mr. *Hay.* I cannot ſubmit to the gentleman's right to the paper; but, however, that no advantage ſhall be taken of it, they may make all the uſe of it they can. There it is.

Mr. *Burr*, to the witneſs. When you ſaid that all the men had guns, or arms or ſomething of the kind, did you mean all the men at the circle, or thoſe that were ſtanding about there too?

Witneſs. Not all the men in the circle. I only took notice of 7 or 8 guns at that time. *Q.* How many men do you ſuppoſe were ſtanding in the circle. *A.* I do not know exactly, I did not count them. *Q.* How many were about there? *A.* A great many about there, but I do not know how many. *Q.* What ſort of guns were they? *A.* What I ſaw was rifles and ſhot guns. *Q.* Did you ſee any guns with bayonets? *A.* I did not. *Q.* Do you know the names of the men you ſaw? *A.* No. *Q.* Do you think you ſhould know any of them if you ſhould ſee them? *A.* No. *Q.* When did you ſee moſt arms, in the day or in the night? *A.* I ſaw more men in the day, but I ſaw more with arms in the night.

Juror. When you ſay that all the men there had guns, do you mean the whole number, or do you mean moſt of them? *A.* The whole number, I took particular notice of it when they ſtarted.

Mr. *Burr.* You ſaid that ſome of the men in the circle had guns and ſome had not: are you ſure that you ever ſaw thoſe who then had not, with guns in their hands at any time? *A.* I have ſtated that part of them in the circle had not guns, but that every one had, as far as I could ſee, when they ſtarted. *Q.*

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Thoſe men who were conſtantly buſy in getting the boats ready, and thoſe who were running about: have you ever ſeen them with guns? *A.* Yes: they had guns when they ſtarted. *Q.* How many guns did you ſee at one time, or did you ſee more at any one, than at another time? *A.* The moſt men that I ſaw was in the evening, when I was down on board. *Q.* Did you ever ſee more together than theſe in the circle? *A.* No, not in one bunch. I ſaw moſt arms in the day time, but moſt men armed in the night.

Juror. At the time of pointing the guns at Gen. Tupper, did they threaten to ſhoot him? *A.* What I ſtated was the words that were ſaid. *Q.* Was it ſaid in an angry tone? *A.* I cannot ſay whether he was angry, or in good humour. *Q.* Did you ſee the arms in the boats in the middle of the day? *A.* I ſaw moſt at one time in the day: ſome of them were lying on the ſand bar, and ſome of them they were ſhooting at marks with. *Q.* How many arms do you ſuppoſe you ſaw? *A.* I cannot tell. *Q.* Enough, do you think, to arm the men who were there? *A.* Yes, to the beſt of my knowledge, there was.

Mr. Randolph. Do you know that they were the ſame arms, or that they were the ſame men armed whom you had ſeen before? *A.* I know that they belonged to the boats.

Mr. Wickham. How do you know that they were the ſame arms? Or, how do you know but you might have ſeen the ſame arms ſeveral times in ſucceſſion.

Mr. Burr. Why do you not anſwer?

Witneſs. Why, I am not obliged to anſwer what I do not know.

Mr. Burr. You are obliged to anſwer.

Juror. Sometimes one man might have poſſeſſion of a gun, and then another man might have poſſeſſion of the ſame gun: that is the meaning.

Witneſs. I cannot tell: I ſay to the beſt of my knowledge.

Mr. Burr. If the gentlemen have done with their witneſſes as to the overt act, or whenever they have done, we ſhall be obliged to them to apprize us, as we have ſome obſervations to offer to the Court on the ſubject.

Mr. Hay. We ſhall go on with our evidence: we have additional evidence upon this very point.

Mr. Burr. Very well: we ſhall liſten to it. At the ſame time I wiſh to mention to the Court the irregularity of any part of this teſtimony as a charge againſt me.

Teſtimony of WILLIAM LOVE.

Mr. Hay. Were you on Blannerhaſſet's iſland? *A.* Yes; but not there at the time when Col. Tyler's boats arrived there. I was then at Marietta; and it was on Sunday that I went down in a ſkiff with two barrels of ſalt. *Q.* How many boats were at the iſland? *A.* Four. *Q.* How many men. *A.* I can-

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not tell you; but I suppose about, betwixt 20 and 25 belonging to Col. Tyler's boats. *Q.* Did you see any arms? *A.* I saw the men had rifles. I know that Blannerhasset took away with him two blunderbusses, one pair of Horse pistols and a dirk. Some fusees were put in the boat; but not more than 3 or 4. *Q.* And what arms had Tyler's men? *A.* Pistols, Dirks and Rifles they brought there; but not all were armed with Rifles. I know not whether they were armed with different things. Being as how Mr. Blannerhasset's servant, that is his groom, I went down the river with him. *Q.* Did you see Taylor and Allbright there? *A.* I knew Peter Paylor very well and I saw Allbright. I saw Mr. Woodbridge too. *Q.* What time did you set sail? *A.* We were the last to embark; and we set off between 12 and 1. We parted with General Tupper in the greatest friendship. *Q.* Did you see the prisoner on the island? *A.* I never saw Col. Burr on the island: I first saw him at Natchez bout two and a half years ago. *Q.* What took place after you left the island? *A.* That night was very cold. The next morning we stopt and made fires. Mr. Blannerhasset and Col. Tyler went ashore and called the company together; and the best that I could make out, was, that the Governor of Ohio had uttered state warrants against Mr. Blannerhasset and Tyler; and that they wanted to make their escape as fast as possible. I went down with a party to Bayou Pierre, where—

Mr. Burr expressed a wish that the attention of the witness should be at present confined to the transactions on the island.

Mr. Martin. Gentlemen had better confine themselves to facts within the district of Virginia. When they travel beyond the district, we shall have some important questions to bring forward. We shall object to the production of such evidence.

Mr. Hay acquiesced for the present in this arrangement.

Cross Examination.

Mr. Burr. Did you assist in putting things on board the boats for Mr. Blannerhasset? *Witness.* Yes. *Q.* Do you remember what things they were? *A.* I assisted to pack his portmanteaus and saddle bags; and also my own clothes. *Q.* Did he not pack up his books in large boxes? *A.* I never saw him pack up any. *Q.* How long had you lived with Mr. Blannerhasset? *A.* Not above ten or twelve days. *Q.* How many guns and rifles were there in Tyler's party? *A.* I cannot say: There were several men that I did not see: I know that there were several young men that came down who went out a gunning. *Q.* Did you see any thing like military appearance? *A.* I say that they were in preparation to defend themselves: they expected the people over from the mouth of Kenhawa to tear down the house and destroy the island. To my opinion they did not mean to be killed without returning some shot. *Q.* You spoke of guns in the house; what were they kept there for? *A.* Why he kept them

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for his protection: the people did not like him very well. *Q.* How long was it before you went off. *A.* Why about midnight: it was very cold: Mrs. Blannerhaſſet was ſtanding there and ſhe was crying; ſhe was on the ſand bar.

Mr. M'Rae. Were they prepared to defend themſelves? *A.* I do not know whether they were or not: they were in a different room to what I was, ſo I could not ſee them.

Mr. Burr. When you firſt came to the iſland, did they appear to be in fear of being attacked? *A.* No, Sir, not till Col. Tyler came down. It was then talked of tearing down the houſe. *Q.* And did they mean to defend it? *A.* Yes, certainly. I ſhould be very ſorry to ſtand ſtill and let a man give me a ſlap in the face without returning the blow. *Q.* You were a very little time abſent from them? *A.* Very little. *Q.* You did not ſee Gen. Tupper there? *A.* I do not know that I did; I was very buſy, I ſaw Mr. Woodbridge there. *Q.* Did you ſee any thing like diſturbance or quarrel going on among the people? *A.* No, Sir there was a good deal of ſociability among them. I did not part with my old friends in England more comfortable than parting with the people on the iſland.

Juror. Did you know Gen. Tupper at that time? *A.* Yes, I ſhould have known him if I had ſeen him. *Q.* Did you ever ſee all the arms that were in the boats? *A.* I cannot tell about that. When I got down the river to the mouth of Cumberland I ſaw a cheſt of arms opened. [The witneſs was here ſtopped from giving evidence of any thing that did not occur on the iſland.]

Mr. M'Rae. When the things were put on board at the iſland, were there any cheſts put on board, or did you ſee any that were on board before? *A.* I cannot ſay. They might have been put on board without my ſeeing them: many things were taken on board when I was not there.

Juror. Had you any converſation with Mr. Blannerhaſſet about the object of the expedition? *A.* No, Sir, only this: that if I liked to go with him, he would cloathe me well: and that when I got to Natchez, if I did not like to go farther, I might meet with ſome travelling gentleman that I might engage with perhaps. But, that if I went on with him to the Waſhita lands, he would give me a piece of land to myſelf.

Mr. Hay. That cheſt which you ſaw opened, did it come from the iſland? *A.* No, I believe not.

Mr. Burr. Did you ſee any cheſt of arms put on board any where? *A.* No *Q.* Did you ever ſee any guns in Mr. Blannerhaſſet's houſe, more than he always kept there for his own uſe? *A.* No. *Q.* Did you ever ſee any with bayonet's? *A.* No.

Mr. Hay. Were the perſons that you ſaw with the boats in the appearance of young gentlemen? *A.* Yes. *Mr. Burr.* What do you mean by gentlemen? *A.* Why, Sir, they were

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well dreſſed, and they appeared to me to be like men who lived upon their property, and not uſed to hard work. They always behaved very well to me.

Mr. Wirt. What was the reaſon of the boats ſtarting in the night? *A.* Becauſe, as I conceived, Mr. Blannerhaſſet ſhould not be taken. *Q.* Was there any alarm? *A.* Yes. *Q.* What was it? *A.* Why, the governour of Ohio iſſued a warrant againſt them as I underſtood. *Q.* Did you hear them ſay that they would defend themſelves? *A.* No, I did not hear them ſay any thing of the kind.

Mr. Wickham. You ſay there was a talk of pulling down Mr. Blannerhaſſet's houſe, did you know any thing about ſuch a deſign? *A.* Why I heard at Marietta, that they intended to mob Col. Burr, and his daughter and his ſon in law; and to deſtroy them.

Juror. Did you ſee any bullets run? *A.* Yes. *Q.* How many? *A.* I cannot ſay. *Q.* How many men were employed in running bullets. *A.* I cannot tell that. *Q.* Did they ſay what the bullets were for? *A.* No, not that I heard. *Q.* What time was it they were running bullets? *A.* In the day time: I think in the forenoon. There were many of the young men went out fowling.*

Examination of DUDLEY WOODBRIDGE.

Mr. Hay. Were you on the iſland on the day that Mr. Blannerhaſſet ſtarted?

Witneſs. Yes ſir, I ſlept on the iſland the night the party went off.

Mr. *Wirt.* What party do you mean? *A.* I allude to the four boats with Col. Tyler, Mr. Smith, Mr. Belknap and Mr. Blannerhaſſet. *Q.* Were you at the boats? *A.* I paſſed them about duſk, as I was coming over on the iſland. *Q.* Did you ſee any of the men? *A.* I ſaw five or ſix men about the boats, and when I went into the houſe, I ſaw 15 or 20. *Q.* Do you know the whole number of men together? *A.* No, I cannot tell:—this is about the number that I ſaw.—Having buſineſs, I enquired for Mr. Blannerhaſſet at the houſe: I found him there, in company with ſome other perſons. *Q.* Was this about duſk? *A.* Yes it was juſt at duſk. *Q.* Had theſe men their arms in their hands at the time you ſaw them? *A.* No, I have no recollection of ſeeing any arms, but a pair of piſtols that lay on the bureau, in the room where I ſlept.

Mr. *Hay.* Pleaſe to inform the Court and Jury what you know on this ſubject.

Witneſs. I will commence with my ſtory. About the firſt of September or the laſt of Auguſt, in 1806, Mr. Blannerhaſſet,

* See teſtimony farther under dates of September 18 and September 22.

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in company with Col. Burr called at our counting house at Marietta. It may be necessary first to state that I had been connected with Mr. Blannerhasset in commercial business for six or eight years past at Marietta, under the firm of Dudley Woodbridge and Co. Mr. Blannerhasset observed that Col. Burr wished us to purchase a quantity of provisions for him.

Mr. *Martin.* Was this in the presence of Col. Burr? *A.* I cannot positively say, but I think it must have been, from the circumstances.—Col. Burr went into an enquiry of the price of various kinds of provisions: and also into the expence of boats that would be suitable to take these provisions down the river. After making a number of enquiries, and receiving such information as I could give him on the subject, he left a memorandum of such articles as he wanted; and also of the boats which he wished to have built: they were to be of what is called the Schenectady model, such as are used for the navigation of the Mohawk, above Albany.

Juror. How many did you have built? *A.* Ten or Eleven: he had left his orders for 15. They were about 10 feet wide and 50 feet long the largest; the smallest were but 40 feet long. *Q.* What provisions were ordered? *A.* There was Pork, Flour, Whisky, Bacon and Meal. He enquired the quantity that we thought we could purchase; and left a memorandum that we should purchase as much as we could, if we could procure under certain prices. I immediately made a contract with Col. Barker for the boats: first to supply us with ten, and afterwards with 25. They were to be built on Muskingum, about seven miles above Marietta, and were to be delivered at Marietta on the 9th day of December. On the morning of the 9th or 10th I saw some six or eight armed men going up to take possession of the boats. They were militia. This was on the same morning that the boats went off from the island. I was going to Blannerhasset's island, and met Blannerhasset, Comfort Tyler, Mr. Smith and several young men from Bell Pre coming to take the boats down. I told them what had occurred, and that they certainly would be stopped. It was agreed that they would return again to the island. Mr. Bl. requested me to come down that evening with my papers.

Juror. Were the young men who were going after the boats, armed? *A.* No, Sir. After I had made my arrangements, and prepared my papers, I went down in the evening about sun set. Mr. Bl. and myself had agreed upon a settlement, in consequence of the dissolution of partnership, for two months before, but it was put off on account of one or two items, among the rest the draft of Col. Burr, which I refused to take on account of the long sight on which it was drawn; viz 90 days, observing that the draft would not fall due until after the time in which the boats and provisions were to be delivered, and that I wished to run no hazard. Mr. Bl. with some warmth asked me if I doubt-

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ed Col. Burr's honor; and ſaid if it was not honored he would pay it himſelf: he would relieve my fears by guaranteeing the draft. *A.* Who drew the draft? *A.* Col. Burr drew it on Mr. Ogden of New-York. *Q.* Who offered it to you? *A.* I think Mr. Blannerhaſſet.

Mr. Hay. Do you recollect the tenor of the contract, where and how the boats were to be delivered? *A.* There was no written contract at all upon that point. They were however bringing them down the Muſkingum from where they were built, to Marietta, under the direction of Mr. Barker: I think they were taken poſſeſſion of there or juſt above. The proviſions which the company had purchaſed were lying at Marietta, at our ſtores: I went about ſunſet to the iſland, and after enquiring for Mr. Bl. was introduced to him. We were an hour or two ſettling our buſineſs of the partnerſhip. I then thought I would go home; I accordingly went away acroſs the river on my return, but there I met with Mr. Belknap: he requeſted me to return again with him to the iſland, as he had ſome buſineſs to ſettle there with Mr. Bl. I returned accordingly, and about 9 o'clock went to bed. I was not, as a witneſs has ſtated, walking up from the boats to the houſe with Mrs. Bl. and Gen. Tupper, for I remained in bed, and was not out of the houſe till next morning 9 o'clock. *Q.* Had you been down to the boats at all? *A.* No, not to the boats; I was down to the ſhore about 8 o'clock, on my return home.

Mr. Wirt. Was the contract for the boats and other articles made to yourſelf?

A. No Sir: it was a company concern. *Q.* Do you know who the boats were built for? A. No: Col. Burr was the man whom I made the contract with. About the firſt of September, I think it was, Mr. Blannerhaſſet mentioned to me that he had embarked in an enterprize with Col. Burr; that Gen. Eaton and ſome others were alſo engaged in the enterprize. I do not particularly recollect any other names. He obſerved to me that their proſpects were very flattering. This he ſpoke in the few minutes which our firſt converſation laſted; but the next week I was at the iſland; he then went into farther particulars reſpecting it. The inference that I drew from his converſation was that the object was Mexico. I do not know that he poſitively declared that to be the object: he however ſhewed me the map of that country, and ſpoke very highly of its fertility and healthineſs. From theſe things I drew my inference. He aſked me if I had a diſpoſition to join. I told him that the certainty of my preſent ſituation was much preferable to an hazardous one. He then remarked that he did not wiſh me to ſay any thing of the converſation that had taken place. I never heard how the object was to be effected, or any thing more than I have related. *Q.* What articles did you purchaſe? *A.* I did not purchaſe any other article than

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Pork : that was taken and ſold as I underſtood, either by order of the Preſident, or of the government of Ohio. *Q.* What was done with the boats ? *A.* Some of them I believe were fitted up, I believe, for conveying troops for the government down the river to St. Louis.

Croſs Examination.

Mr. Burr. In ſpeaking of theſe boats, do you recollect that I repreſented them as a ſort of boat that would go up ſtream as well as down, and that I had ſeen ſuch ones on the Mohawk. *A.* Yes. *Q.* Did I not find fault with the clumſineſs of your ſort of boats ? *A.* Yes. *Q.* I left it principally to your diſcretion, having mentioned that I wanted boats to aſcend the ſtream as well as to deſcend ? *A.* Yes. *Q* Were you not much ſurpriſed to imagine that Mr . Blannerhaſſet could be a military man ? *A.* Certainly I ſhould think him incompetent. *Q.* Do you think that he could diſcover, at a ſmall diſtance, a man from a horſe ? *A.* No, he could not. He reads with his book touching his noſe. *Q.* Did you ever hear that he pretended to any military knowledge or talent ? *A.* No, Sir. *Q.* Do you know what became of his library when he came off ? *A.* I underſtood that he took part of it down the river with him : part of it went with Mrs. Bl. and the remainder was attached and ſold on the Iſland. *Q.* Did you ſee any part of it packed up ? *A.* Not as I recollect. *Q.* Can you be confident, within three or four days, of the time I was at your counting houſe ? *A.* No, I cannot : I am certain though, that it was not later than the beginning of September : I left Philadelphia about the middle of Auguſt, and from that circumſtance am the more certain. *Q.* Have you heard that I have been there, or in that neighbourhood ſince that time ? A. No, Sir. I think you were to have returned at ſome time, but you did not. You gave me a draft for 2000 dollars which was paid by Mr. Ogden, and the balance was to be paid when you returned. I have not ſeen you ſince till I ſaw you here. *Q.* How large a quantity of Pork did you purchaſe for me ? *A.* It was ſomewhat ſhort of 100 barrels. Q. What became of it ? *A.* Part of it was ſold by Gen. Buel, an officer of the government. Q. At what price was it charged to me ? *A.* At 13 dollars. It was taken while I was over the mountain, and I knew no more of it than I was told : it was ſtored in Mr. Green's cellar, adjoining to our ſtore. Q. Did you ever demand this property of Mr. Green ? A. No, Sir. Q. Did you conſider the Pork as delivered to me then ? A. That I do not know, it may be a matter of diſpute yet perhaps. Q. What did you ſay became of the boats ? A. I believe they were taken by the order of the governor of the State, and I believe afterwards repaired by order of the Secretary at War, and ſent with troops to St. Louis. Q What were the boats each charged at, do you remember ? A. I do not recollect. I think the whole of them, with one or two Mr. Bl. had fitted up for himſelf, amounted to about 12 or 1300 dollars.

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Mr. Martin. Was you that evening at all down at the water side with Mr. and Mrs. Blannerhaſſet ? A. No, Sir. Q. Did you ſee Gen. Tupper there ? A. No, not that night.

Juror. Did you know that the boats were going off that night when you went to bed ? A. Mr. Bl. told me, that as ſoon as he could compleat his buſineſs (which might be three or four hours) he ſhould go off.

Mr. Wirt. You have been aſked as to Mr. Bl's. military talents—give me leave to aſk you as to his money matters ?

Witneſs. I do not preciſely know, but I will come as near as I can. I gave him 6000 dollars as his moiety of the profit of the buſineſs : and there were perhaps, 4000 dollars in ſtock. Q. But what was his fortune worth ? what caſh do you ſuppoſe he could command ? A. Much leſs, I believe, than is generally ſuppoſed. He had 5000 dollars I believe in the hands of his agent in Philadelphia, His property on the iſland, and the improvements, coſt him about 40 or 50000 dollars—it would not, however ſell for near that ſum (perhaps for not more than half or even 10000 dollars) except to a perſon of a ſimilar taſte with Mr. Blannerhaſſet. Q. Do you know of any foreign funds that he poſſeſſed ? A. No, I do not think he had any—I think he ſold out of the Engliſh 3 per cent ſtock, and bought into the American 8 per cent ſtock with the money. Q. What do you ſuppoſe was his paternal eſtate ? A. Perhaps 20000 pounds, with what was left of which he purchaſed in the 3 per cent Engliſh ſtock. I ſuppoſe that his property, excluſive of the property on the iſland, and about five negroes, was about 17000 dollars. He may have other property, but not that I know of. Q. Was Mr. Bl. eſtimated to be a man of talents and penetration ? A. Yes : he was a man of literature : it was eſtimated through the country that he had every kind of ſenſe but common ſenſe. Q. Would his nearneſs of ſight permit him to write ? A. Yes.

Mr. Burr. What were his favorite purſuits and paſſions ? did he diſcover any taſte for chemiſtry, muſic, or any other branch of ſcience ? A. Yes, Sir : theſe were his favorite purſuits.

Mr. Hay. Had you previous to this draft, ever received any money from Mr. Burr ? A. No. Q. Was not Col. Burr to have returned to the iſland ? A. I believe ſo, though I do not know that certainly. At the time the contract was made, he told me that he was to come back in two months, and that was the time I expected him : he was then to pay the balance, and take away the property. Q. Did he tell you at the time of the contract, that you were to take a draft ? A. Yes.

Mr. Lee. With reſpect to Mr. Bl's fortune, does he own the whole of the iſland, or a part of it ? A. About one half. Q. How many acres do you think he owns of it ? A. I think he mentioned to me about 180. Q. What did he give for the land ? A. He gave 5000 dollars for it before any improvements were made on it.

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Mr. Hay. I think you say that one of the boats was fitted up for Mrs. Bl. and family? A. Yes, one of the large boats was.

Mr Martin. If I understand you, Col. Burr had recieved no consideration, even for the 2000 dollars which was paid? A. No, not that I know of: at least, he got nothing from me.

Mr. Hay. Were these boats charged to you? A. Yes, they were all charged to the company: to Dudley Woodbridge and Co. Q. Who were they charged to in your settlement? A. They were charged to Mr. Blannerhasset: I did not know at the time of the settlement, that the draft was paid, though I found it to be so afterwards.

Mr. Wirt. If the delivery of these boats had not been prevented by the government, would they not have been delivered to Mr. Blannerhasset? *A.* Yes, certainly, for he had paid for the boats by his guarantee of the draft.

Mr. Burr. Did I give you any order of that kind? *A.* No, Sir.

Mr. Martin. If I understood you, Col. Barker was to deliver them to the firm? A. Yes, he was. Col. Barker did not know, except by surmise, who the boats were for.

Chief Justice. Had the prisoner left Bl's island at the time you had conversation with him at Marietta? A. Yes, I considered so—There is one circumstance perhaps I ought to mention: on Blannerhasset's return from Kentucky, which was the first time I knew of the intended dissolution of our partnership, he called upon me and said that we were looking different ways in our pursuits: that he intended to go down the river, and therefore wished me to prepare a statement of our accounts. As to the boats and property in the partnership, I should have felt myself safe on every score, as I had three times the amount in my hands, belonging to the company.

Mr. Baker. At the time you crossed the river on the night the party went off, did you stay at all on the beach to see them? *A.* No, I went directly up to the house. Q. Is Bel Pre a village? *A.* Yes, it is situated directly opposite to the island.

Mr. Lee. Was there any noise among the people: were they peaceable, or were you disturbed by them during the night? *A.* I slept during the night in a lower room: several people came through the room, but I was no way disturbed: indeed I scarcely recollect waking until day break, when I got up. Q. Did you hear any thing like the roaring of cannon, or the clashing of arms? *A.* Nothing.

Mr. Wirt. Was there any alarm on the island occasioned by a report of the approach of the militia. *A.* I recollect that in the course of the evening there was some noise on the bank of the river, which appeared to excite some sensation of apprehension. Q. On which side of the river? A. On the Ohio side. Q. Did you hear any conversation about the reason of the alarm? A. No, Sir.

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Juror. Was it that alarm which induced them to go off in such haste? *Witness.* No: Mr. Bl. was determined to go off as soon as possible: he told me that Col. Tyler had been waiting there two or three days for him, and was very impatient to go. *Q.* Did you see any thing of the President's proclamation on that day? *A.* No, Sir: the first time I saw any thing of the proclamation was, perhaps, three days afterwaads. They went off on Wednesday, and I think the proclamation arrived on Friday.

Mr. M'Rae. Had you heard any thing of it when they were going off. *A.* I might, but I do not know that I did. *Q.* Then the proclamation you saw came by the mail? *A.* Yes: the post-master handed it to me. *Q.* Did you hear nothing of the proclamation being issued, and sent express to the county of Wood? *A.* No, Sir. It was said that the boats would be stopped. *Q.* What. without a proclamation? *A.* Perhaps so, I do not know. I think it seems to present itself to my recollection that I heard something about a proclamation from our printer: it might have been sent by a dispatch, before the mail arrived.

Mr. Hay. Did you hear any thing of a state warrant at that time? *A.* I did hear that the Legislature of Ohio was acting with closed doors, in consequence of information that Mr. Graham had given; and it was supposed the boats would be stopped, and the enterprize suppressed.

Mr. Wickham. Did you understand that the Legislature of Ohio would interfere with this particular party, or stop the boats? *A.* I thought that they might all be stopped, men, boats and all. *Q.* Had you any idea that the Legislature of Ohio would interfere with the boats on the island? *A.* I did not suppose that they would attempt to exercise any authority in Virginia. *Q.* How far is the seat of Government (Chilicothe) from there? *A.* About 100 miles. They could not have got any information there of Col. Tyler's arrival at the island.

Mr. Hay. Did you enquire of Blannerhasset why he was so anxious to go in the middle of the night? *A.* No, Sir. I certainly had my ideas that it was from fear. *Q.* Did you hear any particular observations from any of the party on the island? *A.* Yes. I heard Comfort Tyler say that he should not oppose the constituted authorities, (that was his precise expression) but that he would not be stopped by a mob.

Mr. Wirt. Did you understand this "mob" to mean, the regular militia of the state? *A.* There was no militia then. I saw the militia of the county of Wood, the day, or two days afterwards.

Mr. Baker. Did you hear Mr. Blannerhasset tell Mr. Tyler that he had stopped him two or three days, and that he did not wish to detain hm longer? *A.* Yes.

Mr. Burr. Was there no danger of being stopped by the ice? *A.* Yes, I know that it was very cold and there was ice.

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The day I saw the proclamation the river was very full of ice. *Q.* Is it not usual to go down the Ohio both day and night? *A.* Some do venture, and some do not. *Q.* The boats crews were commonly called Tyler's party, were they not? *A.* I understood so.

Mr. Wirt. Who was there living on the island to be affected by the landing of any men besides Mr. Blannerhasset? *A.* There was no other property there but Mr. Blannerhasset's. I heard very little about the party.

Mr. Burr. How many families are living on the island? *A.* I do not think there is more than one family besides his.

THURSDAY, August 20,

Mr. Burr. Before the gentleman proceeds with his evidence, I will suggest that it has appeared to me that there would be great advantage and propriety in establishing a certain principle founded upon the facts which have been presented to the Court. The nature of an overt act of treason has been acknowledged, and it cannot be varied in its nature. We have permitted so much of the testimony to go before the Court and Jury in order to prove to every man that no overt act of treason has been committed. The facts which have been presented are to be taken for granted, and yet what do they result in? It was acknowledged by the attorney, in opening the case, that it was expected *force* would be proved: and also, Sir, that I was not present at the time of the overt act. Further, that I am to be connected with other persons, in acts done by them in my absence, and even done without my knowledge: and that other facts, brought for distant places are to be brought to be connected with those done at Blannerhasset's island, in order to give to the acts done there, the name of treason. Now, Sir, if the gentlemen have been mistaken in these things, it is right that the Court and the country should be saved the trouble and expence of going farther in an investigation which can afford no possible good.

Certain expressions used by the Supreme Court at Washington have been produced; which opinions have been totally misunderstood. The point which I now mean to bring up is, that such evidence has never been admitted in any Court, by any judge, nor at any period: such a question was never required to be debated. I need only refer to the gentleman himself, to prove that the opinions given at Washington ought not to have the weight of authority. His argument and his very language will be sufficient to establish the point now made, to wit: that nothing is to have the weight of authority, except it goes to the point under consideration. Now this was a mere incidental decision of the Supreme Court, and not founded upon any point at issue. Now, we have a right to call upon him to say whether an assemblage of men merely can be called, or any way tortured into

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the name of "levying war." This point must be inevitably determined at some stage of the examination; and therefore we contend for our right to require the prosecutor to shew that every witness will give testimony to that point, or his testimony will be null, and, of course, unnecessary. Another point of considerable importance, must also be decided before the issue, to wit: whether a person not present: remote; in another district, and at a distance of upwards 100 miles, can be considered, in any possible legal construction, to be present, or concerned in the transaction, so as to make him a principal in the guilt of it. We say that it cannot possibly be. Further. The gentleman must see that the necessity of examining the remainder of these 135 witnesses is done away, because their testimony can have no bearing on the case, and consequently all such sort of testimony is impertinent to it.

If the gentlemen mean to expect to prove the overt act: if they mean to prove that I am the source of the whole transaction: and if it was so as that there was any thing like an act of violence on Blannerhasset's island; and was actual war waged; actual exertion of force used, a collision of arms and the like, then to be sure the case will have a right to go on that point: but even then, there would be an absurdity, because my being at that time at a distance, where I could not take a part in it, what can it possibly have to do with me? The case is different from what the gentlemen think it is. Well: if it be so, or there be a doubt about it, or in relation to the opinion referred to, it is right to ask the Court what was the opinion given at Washington: whether it has a reference to this case, or, indeed, whether it refers to any point whatever that was then in dispute.

I crave the patience of the Court and Jury for this seeming interruption. But it surely is important for us to settle this principle primarily: what is the law on this important point? It is a question which never has yet been decided in any Court, or by any Judge, and it is proper that it should be now settled, when an important case depends upon it. I consider that no time can be wasted in the examination of this principle, and I trust the Court will listen to the arguments and authorities with patience. The gentlemen who are engaged with me as my counsel will enlarge on these points, and, if I am not mistaken, they will prove that this is the moment when the argument and decision will be most applicable, because upon the result will rest the future fate of the case. What is, and what is not applicable testimony; what is and what is not treason by our Law and Constitution, are questions which will now immediately bear upon the progress of the case. If it is any thing like a collision of arms, or any other kind of treason, the evidence may be collated to prove: or whether, by examination, it can only be, what has been denominated, accessorial treason, will come into view. Now, if my

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ideas are right, the gentleman means to argue that a bare assemblage of men, coupled with previous treasonable declarations, is treason. I understand that they mean to contend farther: that a person not being present, but absent from the place where the treason is laid, he having counseled and advised the operations, should be denominated a principal in the treason. But this, I shall contend is a species of constructive treason: again; I shall ask what an accessary means, and prove that if it means what they think it does, resort must be had to the exploded common law of England. These questions, Sir, will demand some attention from this Court, and it will be extremely interesting to the country at large, because every man might be affected by it. Gentlemen ought to come forward and say that they mean to charge me upon the common law. That though there was no force used in reality, yet, by construction, there was force used—that though I was not personally present, yet, that by construction I was present—that though there really was no military array, yet, by construction, there was military array. Now, Sir, we totally and entirely deny all these things upon the soundest principles; and it is full time that it should be known what is, and what is not, the law on the subject.

Mr. HAY. I have no objection to any fair enquiry into these principles, but the gentleman's motion is premature, and his conclusions are incorrect. I believe that testimony will be introduced, and that presently, which will give a very different aspect to the transactions on Blannerhasset's island, to what has appeared. There was not on that island, what Mr. Lee calls "open war" I admit: there was no "collusion of arms" nor "hard knocks," but we will prove that there was *military array:* that the men were collected for military purposes, and that a military object was in view. But, Sir, it is impossible for me at this time to say in what precise light the transactions on Blannerhasset's island will ultimately appear, because new light is every moment coming in. But, Sir, after all the knowledge which the Court has had exposed to it of the transaction. and with the certainty of what might be brought to view, will you undertake to say that an overt act of treason has not been proved, and that it cannot be proved? An overt act of treason is a point of fact, and the time and manner for that fact to be ascertained is for the Jury, when they retire to their room. It is the province of the Jury, and their's only, to say whether the act has or has not been committed. Now what is the effect of these observations which you have heard? Is it to save the time of the public? No, Sir, it is to arrest the progress of the enquiry: it is to prevent the public from seeing what they ought to see, and of withdrawing the acts which have been committed, and to lead them falsely to conceive that no act, hostile to the tranquillity of the country has been commited. Sir, it is in vain to talk about time,

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when the ſubject of the peace and tranquillity of a nation is investigating, and when plans are about to be developed which may hazard it. There is no privilege—no authority in this Court, or in G. Britain which affords a power to arreſt enquiry, and to tell the Jury that the act has not been proved, and therefore there is an end to the caſe. Sir, thoſe engaged in the proſecution have avowed to the Court that certain acts will be proved, and the Court have declared that we ſhould go on with our teſtimony: let not the enquiry therefore be arreſted in its courſe to that proof. When the whole of the teſtimony which belongs to the accuſation ſhall have been laid before the Court, then it will be in the power of the accuſed to addreſs to the Court a motion for inſtructing the Jury on any point of Law which the circumſtances of the caſe might require. It will then become the duty of the Court to take up the ſubject and ſay what is the law upon the caſe: the Jury upon that will take the facts under their view, and regulate their verdict agreeably to the law and facts that may appear.

I did not underſtand, diſtinctly, the purpoſe for which the accuſed made a remark on the common law of England. Sir, we do not rely on the common law: the fact is, we leave the common law out of the queſtion. I do not underſtand, nor ever did underſtand, how the common law had any thing to do with an enquiry before any of our courts, except it was, any part of it adopted by ſtatute. I am perfectly willing to ſteer clear of the common law, and go entirely upon the principles of ſtatutuary law and common ſenſe. The caſe is a charge for overt act of Treaſon in levying war: will common ſenſe ſay, or will our ſtatutes or conſtitution require that the perſon who produced a this commotion ſhould be preſent when the battle was fought, or even when the troops were collected for the enterprize? I conceive the queſtion to be, whether the accuſed was principally concerned with it—whether he did project it and carry it on with a deſign to compleat it. Now how is this to be aſcertained fully, Sir, unleſs we are permitted to go on with the evidence?

Mr. Wickham obſerved, that the attorney for the U. States having heretofore promptly expreſſed himſelf inimical to reflections about views and intentions in the manner of proſecuting the enquiry in to this caſe, he ſurely did expect that gentleman out of regard to the correctneſs of his own admonitions, would have withheld any thing which had that tendency before a Jury: on the contrary he has thought proper to charge our motives to ariſe from a deſire of courting the public ear: but for what purpoſe can ſuch expreſſions be uſed, as, that *we* wiſh to miſlead the public as to the views of Col. Burr? Let the gentleman purſue his own admonition, and we will join with him in declaring (as we ever have done) that popular appeals, before a court and jury, ought to be laid aſide.

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The gentleman says that light is breaking in upon him every moment. Whether this light is as to law or fact, I will not pretend to say, but I must give my opinion that it is as to fact, for I may be pardoned in saying that as to Law not one solitary ray has ever broken into his mind. I think that we shall prove, even to himself, before we have done, that he ought to abandon all ideas that he has ever possessed the least glimpse of knowledge of the law on T reason; and that even the sanguinary and tyrannical Jeffries never proceeded upon principles more diametrically opposite to human rights than he has done in the presen prosecution. I am very willing to suppose that he has done it without intention, but the oppression is nevertheless the same. It is not wonderful that the gentleman should be totally ignorant of the Law of Treason, because he has not had occasion for any experience in it: and it is not wonderful that he should proceed as he has done, when he has declared, in this Court, that he is determined to convict Col. Burr. This savors so much of prejudice that he could not examine the Law impartially. Such however, is my opinion of the candour of the gentleman, that I cannot, that I will not believe that he, or any other man of character will come forward in this Court and dishonor his reputation for ever by a wilful wrong.

But it is not a proper time to bring forward such a motion! and why not Sir? I deny that, during the whole of the three days that have been employed, there has been said a single word, by any one witness, that can tend in the least to support the indictment against Col. Burr. It is proved, and indeed the attorney declares, that Col. Burr was not present at the time and place charged. Now we declare that it is absolutely necessary to prove the fact of *presence* at once: we say that the indictment must inevirably fall without it. Now, Sir, if we choose to go into this point, can the gentleman say that I shall not be heard. I am sure your honours will not say so. We might have objected at any time, and require the main point to be proved first, but we have chosen to permit them hitherto to bring forward this bloody transaction at Blannerhasset's island in their own way: But at length we are obliged to say that no more testimony ought to be heard in this case. We trust that we shall be heard; and we now give intimation to the Council that we shall take a wide and extensive range on the subject, which we have a right to do, and by which we are convinced there will be a stop put to the case at once.

Mr. Hay. It is my desire, Sir, to come to the point of this transaction: if we are permitted to continue, we shall come to it sooner than the gentlemen on the other side think, but they appear to be determined that we shall not progress at all.

I never have heard in this, nor any other Court, a more unjustifiable expression that the gentleman last up used in respect to my ignorance of the Law of Treason. Sir, if I am ignorant, I

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err with you—if I am ignorant I err with the ſupreme Tribunal of this country. The ſupreme Court of the country has told us that "all thoſe who perform any part, however minute, or however remote from the ſcene of action, and who are actually leagued in the general conſpiracy, are traitors." Now, Sir, I am willing to incur the diſhonour, black as the gentleman ſuppoſes it to be, of ſupporting the deciſion of ſo reſpectable an adjudication. He may think, if he pleaſes, that it is diſhonourable in me to uſe the ſtrong expreſſions of the ſupreme Court, and zealouſly follow a criminal through all his offences againſt the peace and happineſs of the country; and he may think that he ought to be covered with laurels, becauſe he is engaged in the honourable employment of ſupporting and vindicating a man againſt the juſtice of his country—a man who aimed at the proſtration of its liberties and its happineſs. If he thinks ſo, he is welcome; but he muſt do me the juſtice to ſay that I muſt act from thoſe motives alone which my public ſituation requires of me. Far be it from me to attempt at hurting his feelings or thoſe of any one elſe, but he is ſurpriſingly deceived in me, if he ſuppoſes me capable of being deterred from my duty by his conjectures or his declamation.

Mr. Burr. I hope, Sir, the attention of the Court will not be drawn aſide by any thing which may be deemed perſonal among gentlemen on either ſide. It is far from my deſire to hear any ſuch remarks.

The gentlemen were about to proceed to connect *me* with this act: I deny, Sir, that they can do ſo. They admit that I was not there, and therefore let the nature of the tranſaction be what it would it cannot affect me. Again. I deny there was war, at all, and no teſtimony can be brought to prove that there was war, and ſurely the article *war*, is of imperious neceſſity in the charge of *Treaſon*. Now, if this be true, (and that it is true I appeal to the Court and all who have attended) will the Court go on weak after week in diſcovering nothing that affect me? I was deſirous that the Court, the Juror and the country ſhould know what was charged againſt me; this has been done, and it has been found that I cannot be connected with the facts. I demand the opinion of the Court upon theſe points.

Mr. Martin. If the Law is as we apprehend it to be, there ought to be ſomething done to govern and prevent any irregularities that may be preſented. The cauſe might very probably take up a great length of time if the proſecutor is permitted to go on his own way: it is a very ſickly ſeaſon; the probability of ſickneſs among ſome of the Jury or the Court, is very great: which would prevent the cauſe going on. If one of the Jurors ſhould die, however far the caſe may have progreſſed, the caſe muſt begin anew. But what an immenſe inconvenience and expence would this occaſion? We hope the Court will permit us to go on to prove that the cauſe ought to ſtop where it is.

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Ch. Juſtice. There can be no doubt as to the admiſſibility of teſtimony—Whenever a witneſs is offered; and he is objected by the other council, the court is bound to declare on it.

Mr. Hay. I admit, Sir, of the right of the Court to declare as to the admiſſibility of teſtimony, and hope I am not ſuppoſed to oppoſe it.

Ch. Juſtice. I was about to ſay that ſome of the tranſactions on Blannerhaſſet's iſland remain yet to be gone into; whether it is conſiderable or not, I cannot ſay, it is impoſſible at this ſtage of the examination: whether is it conſiderable or important or not, I cannot ſay. Altho' in the firſt appearance this kind of teſtimony may not appear to be material, yet it may turn out to be ſo by its bearing. I ſuggeſt whether it may not be as well to go through with it.

Mr. Burr. I have no object to that, if they do confine themſelves to Bi's iſland; and ſtrictly to the tranſactions on that iſland—if ſo we will hear it.

Mr. Hay ſaid that the connection was meant to be proved—that the priſoner was, not only connected, but, principle in it, although abſent.

Mr. Wickham. explained: that he meant merely that Mr. Hay was unaccuſtomed to the Laws and Doctrines of Treaſon—that he took the ſubject up (as was his duty to do) altogether *ex parte*; and that the common Law of England on the ſubject, ought rather to be regarded in deteſtation than otherwiſe.

Mr. *Hay* obſerved that if the ſubject of national indignation was expreſſed it would ariſe, not from this bar, but from the development which the documents and evidence would prove—He would progreſs with the teſtimony.

Maurice P. Belknap, a witneſs, was called and ſworn.

Mr. Hay. Pleaſe to ſtate to the Court what you know of the circumſtances on Blannerhaſſet's iſland.

Witneſs. As to the circumſtances there, I know very little: all that I know is by converſation I had with Mr. Blannerhaſſet.

Mr. Hay. Relate then what you do know, or what paſſed as to the accuſed.

Mr. Burr. This is the kind of teſtimony which I object to: it will be contended from ſuch teſtimony as muſt be given, as to this tranſaction, that I had a knowledge of it, and therefore muſt neceſſarily be connected with it. Theſe principles will be again contended for, and I do not wiſh to hear theſe principles again and again to be uſed, in oppoſition of every thing that is law. I know, however, of no objection that I can have to this witneſs's particular ſtatement.

Mr. Hay. This witneſs will prove, direct, the tranſactions that were immediately connected with the circumſtance at Blannerhaſſet's iſland. I ſubmit it to them, whether it is not beſt to go on with the tranſactions down to the mouth of Cumberland river.

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Mr. Burr. Does the gentleman mean to say that the witness ever saw me in Virginia at all?

Ch. Justice. Is the point that you mean to make—that conversation out of Virginia cannot be given in evidence, unconnected with the other transaction?

Mr. Burr. Yes, Sir, we mean to state this as an hypothesis. I do not suppose that a supposition will ever be made that I was present at the island, it must be made upon the whole transaction: but whatever shall appear, as I *was not* at the island, can have no bearing on *my* case. Now, if I was not there, is it proper that any conversation with me at a distance, should be brought in to connect me with any circumstance wherein I took no part? If the witness can testify to the point of the overt act, we are willing he should proceed, but not in the way of proving by distant conversation.

Ch. Justice. I am not understood.

[Here a very desultory conversation ensued between the Chief Justice—Messrs. Burr, Lee and Martin, and Mr. Hay,] which upon the whole was uninteresting—the defendants stated that nothing had appeared or could be produced to connect the prisoner with the transaction, he being absent; and there being no treason in the transaction, the indictment could not be supported.

Messrs. Hay and Wirt contended that it was the same species of evidence which had before been produced, upon the authority and permission of the Court: If they had been permitted to produce testimony from Washington, Philadelphia, &c. &c. to shew the design, why should not other testimony of the same nature be admitted. The evidence given did not go to the overt act, but to the design with which certain transactions were brought about. As the intention formed a part of the crime, they were permitted to go beyond the acts themselves to shew the intention, and it was with this view that they wanted to proceed with this and other witnesses.

The Court ultimately decided that, as it was not possible to perceive the bearing of the evidence, or how far a proof of the intention might connect itself with the charge, any evidence of the same description as had been given it was bound to hear: all that related to the transaction on Blannerhasset's island and that only, was the proper subject of testimony.

Mr. Hay. Then we shall be under the necessity of dividing our testimony, and restricting the evidence of the same man from going beyond a given point.

Mr. Lee. That can be done, it was the course pursued before.

Testimony of SIMEON POOLE.

Mr. Hay. State to the Court and Jury what you know as to the assemblage of men on Blannerhasset's island.

Witness. I never was on the island at that time, but I was opposite to it. I saw a number of men and boats.

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Q. When was this? *A.* If I miſtake not it was on the 18th of December, I arrived oppoſite to the iſland about duſk; it was about 150 yards acroſs. *Q.* Do you recollect any military appearance? *A.* Yes, Sir: in the evening there was a fire lighted up, and it appeared to me that there were a number of men walking about with ſomething on their ſhoulders. I cannot be ſure that they were guns, but, from the light of the fire it appeared to me that they were guns. *Q.* Do you recollect any thing like centinels there? *A.* Thoſe which I ſaw there walking with guns appeared to me to be centinels, though I am not ſure. I did not go over that night, nor did I attempt to go. There were boats frequently paſſing backwards and forwards, and landing where I was. *Q.* To whom did theſe boats belong that were paſſing and repaſſing? *A.* I cannot ſay, but I imagine that they belonged to the iſland: they were ſkiffs or canoes. *Q.* Did you ſpeak to any of the people who croſſed? *A.* I did not to any; I ſtood as much hid as I poſſibly could: I was placed there by the governor of Ohio with authority to apprehend Mr. Blannerhaſſet, as he was expected to paſs there. *Q.* Did you hear any thing paſs? *A.* I did not, that I could underſtand. *Q.* Do you recollect any arrangements about a watch word or the like? *A.* I do Sir. In the courſe of the evening, after I had ſtaid there ſome time, I obſerved that ſome boats did not croſs, and others did croſs. There was a particular word given by thoſe who wanted to croſs. *Q.* What word was that? *A.* Why, when the people on the Ohio ſide wanted to croſs, there was a queſtion aſked, whoſe boat was that? The anſwer which I heard made a number of times was I's boat. I took the watch word to be that, as I heard it a number of times. *Q.* How far was it acroſs? *A.* 150 or 200 yards. Every time that that anſwer was made, the boats went acroſs.

Croſs Examination.

Mr. Burr. How late did you ſtay that night? *A.* A number of hours at that place, and afterwards I removed a diſtance up the river, expecting that he might be there. *Q.* What time of the night was it? *A.* I cannot ſay: I was walking backward and forward, but as much as poſſible out of ſight. *Q.* Was it cold? *A.* Yes. *Q.* Do not the boats commonly build a fire on the bank of the river when it is cold? *A.* Yes. *Q.* How many appeared to be walking about? *A.* I cannot particularly tell, but there was a quantity. In the evening there appeared to be lanthorns going up and down from the houſe to the boats, as if there was ſomething doing. *Q.* How could you know that they were ſentinels, might they not be merely warming themſelves? *A.* Yes, it might be ſo; but it appeared to me that they had guns, though ſeveral of them were without. *Q.* Well, Sir, when you ſhould want to go on the iſland, at any time, would it not be neceſſary to hail a boat to take you

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over. *A.* Yes. *Q.* Do they ever ask who you are? *A.* No, they do not ask who you are. *Q.* Do you think you could have got over with this watch word? *A.* I do not know.

Juror. Were the boats several times hailed and no boats came? *A.* Yes. *Q.* Did you ever see an occasion where this word was used and no boat came over? *A.* I did not. *Q.* What reason had you to suppose that it was a watch word? *A.* Why, Sir, I had been in a military line, as a soldier, in my lifetime; and had watch words given, and as I took notice of that word a number of times, I presumed that was a watch word.

Mr. Burr. Do you live on the Virginia side? *A.* No, on the Ohio side. *Q.* Had you a warrant from the State of Ohio? *A.* Yes. I apprehend that the people who had that word, were belonging to the boats on the island. *Q.* Were any of them armed, that came down to the shore? *A.* I could not discover whether they were or not. *Q.* Did I understand you that when this word was used it never failed to bring the boat? *A.* I do not recollect that it did. I took notice once or twice, that when the word was not used, the boat did not cross.

The testimony of MAURICE P. BELKNAP.

On the evening of the 10th of December, I was at the island of Mr. Blannerhasset; I arrived there between 8 and 9 in the evening. I hailed for a boat; they asked my name, and there was a skiff sent over for me, with two servants in it. After I had crossed, I met Mr. Woodbridge, who returned with me to the house. When I entered, I observed in the hall a number of men; from a promiscuous view, there must have been about 20. Two or three I noticed, that were near the door, where I entered the Hall, were, or appeared to be, cleaning their rifles. That was all the arms that I saw: I merely passed through them.

Mr. Hay. Did you ever see any men down by the beach? *A.* I noticed, near where I landed, there appeared to be two or three boats, and there were some people about them. I was at a distance from them, and the lights in the boats was the only thing that made me take notice of them.

Mr. Burr. Did you not give a watch word when you hailed the boats?

Witness. No, only my name. *Q.* Did any other persons cross that night? *A.* I do not recollect any. I saw Mr. Dana there, but I do not know when he crossed.*

Testimony of EDMUND B. DANA.

Mr. Dana. Shall I state to the Court any conversation which occurred previous to my going on the island, or only conversations had on the island?

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* *See the evidence of Mr. Belknap continued on September 9 and September 20.*

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Mr. Burr. Confine yourself to tranſactions on the iſland, and only there. Were you on the iſland the night theſe people went away, and what do you know reſpecting them, or me, as to that tranſaction?

Witneſs. On the evening of the 10th of December, I underſtood that Comfort Tyler and his men were about to ſtart down the river. Two other young men and myſelf went over to the iſland; we croſſed oppoſite to *Bel Pre*, where I live, a little after duſk; we took a ſkiff and landed at the upper landing on the iſland. There are two or three landings, about 20 rods a part. We went from there up to the houſe. The boats lay about 8 rods below where we landed. I heard ſome men talking as we got upon the bank, but could not diſcover any one. In the hall of the houſe, below ſtairs, there were a number of men. They appeared to be all in a hubbub and confuſion, about a large fire that was in the room: I think there was one of them that was running ſome bullets. I paſſed through the room, but what number there was. I cannot pretend exactly to ſay—I ſuppoſe there were 15 or 16. I was introduced into the chamber, where was Mr. Blannerhaſſet, Comfort Tyler, and Mr. Smith. I think they called him Col. Smith from New York. There were ſeveral other gentlemen there. I was introduced to Mr. Smith and a Dr. M'Carſell, who had his lady there with him. Col. Tyler I had ſeen the day before.

Mr. Coleman, a juror enquired if it was proper to aſk any queſtion about any converſation which took place between thoſe gentlemen.

The Ch. Juſtice obſerved that if the accuſed had no objection, he ſhould not.

Mr. Burr ſaid he ſhould not object to any queſtions which the Jury might think proper to make. The queſtion was not preſſed.

Juror. Were any of the perſons, that you ſaw in the hall, armed?

Witneſs. I do not recollect to have ſeen any arms except a dirk.

Croſs Examination.

Mr. Burr. Were you a perfect ſtranger to the perſons that you ſaw in the hall?

Witneſs. I was. Q. Was there any alarm diſcovered, on their part, upon your going in? *A. No there was not.* *

Mr. Hay. We have now done Sir. We have no other evidence at this ſpot, but what is of the ſame purport as that already given, and here we are ſtopped.

Mr. Botts, was deſirous, before the diſcuſſion of the motion began, to ſuggeſt to the Court ſome relief to *their* (Mr. Burr's) witneſſes, (about 20 he preſumed, ſome of whom were poor) he hoped the Court would direct the Marſhal to pay them from time to time as their neceſſities might require. The Court directed the relief, aſked for to be given.

* See Mr. Dana's evidence continued on Sept. 25.

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Argument on the motion to exclude farther *Evidences* on the Trial for *Treaſon.*

MR. WICKHAM. *May it pleaſe your honors-*

If this were an ordinary caſe, that were likely to be terminated within the period, or ten times the period, that is commonly occupied in maknig a deciſion, we ſhould not now have attempted to make an interruption: but it is obviouſly not ſo, when we take a view of 130 or 140 witneſſes, which the proſecution has announced their deſign to bring forward, (and the defendant has about 20 to produce in his behalf) and when we ſee the number of counſel employed on each ſide. From theſe conſiderations, upon the common mode of calculation, we muſt anticipate that it will take up weeks, if not months, before we ſhall be permitted to ſee a cloſe to this (already) tedious enquiry: nay, Sir, you cannot have a well grounded hope offered you, that, at this inclement and fickly ſeaſon of the year, it will ever be terminated.

But there is enough already diſcovered in the caſe, to ſatisfy you that, prove what they will beſides, the proſecutor muſt fail in his aim, beyond the poſſibility of a doubt. He has no alternative: there is enough to ſhew this Jury, from the ſtatement of the gentleman himſelf, that it is impoſſible for him, in any way within his power, to obtain the conviction of Col. Burr; and the idea of his proceeding is abſurd, and can have no other effect, than an immenſe and uſeleſs waſte of time, and a long impriſonment of the Jury to the great poſſible injury of their healths. He ought at once (himſelf) on theſe grounds, to go forward, and agree to cloſe the cauſe.

It is admitted by the attorney, Sir. *that Col. Burr was not preſent nor within the diſtrict, when the Overt act charged was ſtated to have been committed.* I proceed upon this poſition, which I underſtand to be admitted in fact.

MR. HAY. I only ſtated that we are not prepared to prove that he was preſent.

Mr. Wickham. If it ſhall not be proven that he was preſent, Sir, I contend that under the Conſtitution and Laws of the U. States; under the Law of England; under the invariable uſages of all Courts, it is impoſſible to maintain ſuch a preſentment as that of levying war againſt the U. States. It muſt, inevitably, be proved that the perſon was actually preſent to levy the war, in perſon, before it can be denominated an *Overt Act* of levying war. I know that there are *dicta* of a different deſcription in ſome few Engliſh authorities, but I ſhall be able in its place to eſtabliſh undeniable proof of its inapplicability at the time and place. It is a duty that I owe, not only to my client, but to every citizen in this community, becauſe every individual is intereſted in it: it is a duty that I owe to poſterity, and which, if it were only for their ſake, I never would flinch from executing.

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The firſt ground I ſhall take up to prove this poſition is the conſtitution of the U. States. I never will give my tacit aſſent to ſo dangerous a doctrine as to admit that, under the conſtitution of our country, any man can *poſſibly* commit Treaſon againſt the country except he be *actually* preſent *in perſon* to do the act. On that point alone, though there are many others, I flatter myſelf to be able to prove to your honors that the preſent caſe is not ſuſtainable.

Art. 3. Sect. 3. Conſtitution U. S. reads, that "Treaſon againſt the U. S. ſhall conſiſt only in *levying war* againſt them; or in adhering to their enemies, giving them aid and comfort." &c.

In diſcuſſing this queſtion, my client will pardon me if I ſay that I feel a great deal of pleaſure in ſtating that it is not his caſe alone that I am now arguing, under this poſition: but it is the caſe of *every man* that breathes in this community: that I refer not to the good or bad deeds of Col. Burr—he may be as bad a man as the counſel on the other ſide think that he is: or he may be as good as his counſel contend that he is. It is an abſtract principle that I contend for, relating not to any particular man, but to all men; and it will be a governing principle, as long as the United States ſhall continue a people, with the ſame habits and liberties. If our conſtitution ſhall even "vaniſh; and leave not a wreck behind!" yet this will be a governing doctrine, that cannot change.

The words of the Conſtitution are plain, and no perſon can be convicted for Treaſon under it unleſs he *actually* levies war againſt the U. S. There is no neceſſity of reſorting to any artificial rules of Conſtruction whatever, to underſtand the meaning of theſe words: it is obvious. But, if we are to conſtrue it by any artificial rules, where are they to be drawn from? Why Sir, from the common Law of England, and the rules of Courts there, connected as they are with abſurdities. They have put a conſtruction upon their ſtatutes on Treaſon; and their Courts have been governed by it, but *their* conſtructions, on *their* ſtatutes, are not applicable here, becauſe our Conſtitution, which originally declared what Treaſon ſhould be in this country, is different from a ſtatute that was made to alter or improve the common Law, which before exiſted, as in England. Our Conſtitution is a new, and original compact, made between the people of the U. S. for their mutual government; and has no reference to rules of any particular Arts or Science, to Juriſprudence, or any ſuch thing; but it is formed upon the ſound principles of reaſon and moral rights; which are of ſuperior dignity to a ſtatute.

If, therefore, theſe words, according to their natural meaning, will bear the conſtruction I contend for; and the conſtitution is is ſuperior to any ſtatuary proviſions, it is not neceſſary to argue farther on this point, unleſs the words themſelves lead to abſur-

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dity. The words themſelves, were introduced to prevent any arbitrary conſtruction, or any dangerous doctrine, which ſound reaſon and propriety imperiouſly forbid the genius of our government to permit: and even though they may be ſuppoſed to lean to the ſide of humanity, yet it is a true maxim, that it is better for ninety-nine guilty perſons to eſcape puniſhment than that one innocent man ſhould ſuffer under an arbitrary and wrong conſtruction of Law. Thus, every argument, drawn from reaſon and principles of right, is in our favor. But, if the counſel on the other ſide will rely upon this arbitrary principle in their reaſoning, I ſhall contend, that their conſtruction is not warranted, either on the principles of Engliſh Law, or upon our conſtitution.

Upon the Engliſh Law, Lord Coke (who had no bowels of human kindneſs) is the firſt and principal to ſupport the artificial and arbitrary conſtructions, and his doctrines are contradicted and oppoſed by many writers, ſince that time, who are deſervedly venerated for their talents and humanity. The principle declared by him, and which muſt be contended for in this caſe is, that all are principals in Treaſon, and that there is no ſuch character as an acceſſory; and thus thoſe who, in any degree, participated in it, are included in its guilt, by relation. The rule therefore is a borrowed one, and drawn from the worſt of times. Now what is an acceſſory to a fact. It muſt be either an aider or abetter before, or at the fact; or a receiver after the fact. But the writers in England have not ſettled the doctrine that all are principals in Treaſon: it is an abſtract propoſition of ſome of the writers, and has not been acted on, except in the caſe of Sir Nicholas Throgmorton, if that can ſo be denominated; and are not to ſhape our deciſions on a principle not teſted even in England. That caſe is reported in 1. State trial P. 63. I will not read it becauſe your honor can refer to a faithful copy (in abſtract) of it in Tucker's Blackſtone, Vol. 4. p. 44 appendix. In that caſe the charges are various—Levying war and compaſſing the King's death, ſo that the proſecutor had his chance of convicting the priſoner under ſome or other. I have looked into all the caſes reſpecting aiders or acceſſories before the fact, and diſcover no one to vindicate the doctrine that a perſon can be a principal in Treaſon or in Felony unleſs he was preſent; and I preſume the doctrine cannot be ſupported. The caſe of Mary Speak, in Tremain's pleas P. 3 is the only caſe where the aider or acceſſory of a Treaſon, before the fact, has been ever brought to trial. She was charged with aiding or aſſiſting the Duke of Monmouth in ſending proviſions: ſhe was not an acceſſory in the fact, but before, or during the fact. This Lady was tried in the time of James 2d. before the celebrated but infamous Jeffries, and whether even *he* carried this doctrine through or not, it is impoſſible to ſay, but certainly no one except him did: and I pre-

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ſume that no deciſion of *Jeffries* would be called up as a precedent in our time and country.

The other great branch of Treaſon within the Engliſh ſtatute, is *compaſſing the King's death.* We all know that this crime is ſuppoſed to ſtrike at the exiſtence of the government, and therefore in that country it is conſidered as a heinous offence, and we alſo know that it is a ſpecies of crime which may conſiſt in intention. The agreement or the determination to do the act makes the crime, although no blow be ſtruck. Now, it is impoſſible that there can be aiders and abettors in that crime, becauſe every perſon concerned in the intention is a principal. It is unlike levying war, becauſe it cannot be imagined that an intention or agreement to levy war is levying of war: they only become Traitors, by relation, when the war is actually levied.

I admit, however, that there are to be found in the Engliſh books, convictions of a number of perſons, who were acceſſories *after* the fact; and it may be contended, upon a parity of reaſoning, that caſes of receivers after the fact apply directly to the ſame point. I muſt admit the correctneſs of the poſition, if it is made. But it is proper, when we advert to theſe deciſions, to enquire *at what time*, and *under what circumſtances* they were paſſed. Lady Lyſle's Kernly's and Eliz. Grant's as caſes, in 4 State Trial, pages 106, 141, and 142, and alſo Burton's caſe, relate to acceſſories after the fact. [Mr. W. here read an extract from Hume's hiſtory of England, Vol. 8. Chap. 7. P. 233 in which the cruelties, perpetrated by Col. Kirk, &c. are depicted, with Mr. Humes inference.] Theſe declarations and theſe caſes are precedents. They can find no other.

But, Sir, ſince the revolution of 1688, the deciſions of the Engliſh Courts have led to concluſions directly otherwiſe: the moſt numerous caſes of treaſon ſince that period have been decided by Judges of a different ſtamp, and who are entitled to the higheſt reſpect. The deciſions upon the rebels of 1745 demand our moſt ſtrict attention and reſpect: the battles of Culloden and of Preſton Pans; and the late Duke of Cumberland's victories over the Rebels, are not yet forgotten; nor are the deciſions of Lord Mansfield or Sir John Strange: and yet, in the whole of the legal adjudications of that period, we do not find one inſtance where a perſon who harboured a traitor was convicted of treaſon; nor are deciſions to be found where the counſellors or adviſers of traitors are conſidered as principals in the fact of treaſon. The pretender's eſcape, is accurately deſcribed, and though it was known who had aſſiſted and harboured him in his eſcape, there is not an authority of a ſingle proſecution in that caſe for harbouring, counſeling or adviſing. But, let us not draw inferences from the ſilence or inactivity of the officers of the Crown or of the Court, but let us advert to the principles upon which the Courts ſaw fit to act. The fact of the preten-

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der having raiſed an army to dethrone the King, (George 2d) was notorious; that the rebels marched from Scotland into England, and gave battle after battle is as well known as the exiſtence of the iſland itſelf. There was no difficulty in proving the fact: every body knew it, but the only difficulty (and all that was to be proved to criminate any man) was, that *he* was there; and engaged in the rebellion. This was a ſituation in which every man became a party, becauſe the rebellion was a general one, and the pretender had marched into the very heart of England. Now, if the government had determined to point out any as victims, what had they to do but to prove that the perſon had committed the crime of treaſon in a certain county; or if they could not prove that, to prove that the pretender had marched into that county; and that the perſon charged, had ſome kind of connection with him in the rebellion; and then, according to the doctrine of the gentleman, the perſon muſt ſuffer! But is it ſo in reality? No, Sir. It was neceſſary that the proſecutor ſhould bring home the overt act of levying war to the perſon charged; and to prove that he had committed the crime in the county where it was charged.

—This doctrine is laid down in Foſter's crown law, pages 3 to 6, and at the foot of page 6 is a remark particularly emphatical; it was laid as the caſes reſpectively required. Now, according to the doctrine contended for, on the other ſide, what did they require? Why, prove that the rebellion exiſted, [whether in England or in Scotland] and prove that there was ſome ſort of a connection between the perſon charged, and the general rebellion, and then he would be guilty? But this was not the caſe, Sir, the connection with the rebellion and the actual engagement *in* it, *at a certain place*, were two things, agreeable to the doctrine of Juſtice Foſter. See Foſt. p. 9, and 9 St. Tr. 558. The facts were not committed by *Deacon* in Cumberland, "where the venue of the overt acts was laid," and, it was the opinion of the Judges that "ſome overt act laid, be proved on the priſoner in *Cumberland*; but that being done, acts of treaſon, tending to prove the overt acts laid, though done in a foreign country, may be given in evidence." M'Nally, 505. Again. Foſter p. 22. Sir J. Wedderburn's caſe, the doctrine is ſtrengthened. The overt act was laid in Aberdeen, and it was proved that he was there: having proved that, they were at liberty to go elſewhere for additional proof. But the doctrine our opponents would contend for, would not require it to be proved that he was in Aberdeen. And, upon that doctrine, ſurely, Lord Mansfield and other counſel of high celebrity would be novices in having admitted of the doctrine of actual preſence. The caſe of Lord Balmarino, in 9 St. Tr. 605, who was charged with having marched into and occupied the city of Carliſle, is of the ſame nature. It was clear that he was not there on the day that the

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city was taken, but that he marched in with his troops afterwards. Now, according to their doctrine, Lord Mansfield would have said there was no difficulty in the case, because whether the prisoner was there or not, would not have mattered, since the army was there, and he was connected with that army.

[Some conversation here occurred between the Court and the counsel on both sides on the case referred to, in which Mr. W. contended that the English law writers were uniformly of opinion that the party charged must have been present at the treason, or the indictment could not be sustained, except supported by the dangerous doctrine of constructive treason, which he could not imagine would be contended for. He mentioned Lord Coke, Stanford and Lord Hale, who had successively copied each other, the history of which opinions was well reported in Judge Tucker's Blackstone appendix to vol. 4, Note ‡, pages 41 to 47, and plainly shews how error has been begotten, and is sustained by error. The decisions and *dicta* of the antient law writers, Lord Coke and others, prove that their theory and their practice was at variance. They were all fond of a particular quaintness of expression, and their opinions were regarded as law. Thus, among others, Lord Coke declared that, in the highest, or the lowest offences, there was no such thing as accessories, but that all were principals. Now if this rule were to be applied to some offences (assault and battery for instance) it would degenerate into palpable absurdity in practice. For instance: A is offended with B, but he does not choose to risk his own person in obtaining the satisfaction of a chastisement, but employs a bravo to do it for him: but how can an action be brought against the procurer? Certainly no one can become a principal in the trespass upon the person of a man, except he who does the act of trespass, and the *act* of trespass is not perpetrated by advising or instigating another to do it. Hawkins's pleas, ch. 29. sect. 4. p. 440. No man, Sir, can be a principal, in an assault, except he be personally present, nor can he be charged with aiding in an assault. Thus, if a man in one county, procure a person in a different county, to make an assault upon another, there can no action for assault lie against the procuror. And this is the practice of the English Courts, whatever the *dicta* of writers might have been.]

Mr. Hay. I certainly have stated that no person who shall procure one man to beat another can be called a principal in the assault.

Mr. Wickham. Well, Sir: if the doctrine and practice of the English Courts were exactly as the gentleman says, and admitting that constructive treasons were constantly punished in England; and that any man connected with rebels was to be declared guilty of rebellion, yet, I shall contend, that it cannot be applied under our constitution or laws. It is well known that

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the ſtatute 25, Edward 3, is the foundation of all the indictments for treaſon in that country, but, that that ſtatute did not create the doctrine of treaſon, or make that crime ſuch, which was not ſuch before, but that it was intended rather to narrow than enlarge the rules of common law, 1 Hale's pleas of the crown, ch. 11. p. 75. 87; and Hume's Hiſt. England. Before that period, it was a common law crime, but under our conſtitution there is no common law, as belonging to the United States. I know not whether it is neceſſary or not to prove this poſition, becauſe I do not know but the counſel for the U. States hold the ſame doctrine. I repeat that, as to crimes and offences againſt the U. States, there is no common law of the U. States as ſuch, but that the Courts are governed by the common law of the State where ſuch Court ſits. Thus the rules of this Court are governed by a common law, not becauſe it is a common law of the country at large, but the common law of Virginia: and ſo it applied in the States reſpectively. Thus, any crime puniſhable by the Conſtitution of the United States, or by act of Congreſs muſt neceſſarily be taken out of any common law juriſdiction, becauſe it is made uniform in all the States. If, therefore, a treaſon was to be tried in a State where there is no common law (if ſuch were) yet the caſe would be preciſely the ſame, becauſe the rule is general, and makes the offence the ſame. As the U. States therefore has no common law, treaſon could not become an offence, but by the conſtitution, or by ſtatute. But, Sir, even though made a crime by the Conſtitution, it could not have become puniſhable but by ſtatute, for the Conſtitution muſt have lain dormant until the law, eſtabliſhing Courts, commonly called the Judiciary act was paſſed. 3. Dallas, Warrel's caſe. Mr. W. alſo inſtanced the Sedition law, and ſome of the caſes tried under it.

Now, Sir, as there is no common law belonging to the United States, no act of Congreſs can refer, or be attached to it more than is the Conſtitution; and hence, it is neceſſary to enact ſtatutes in order to define the puniſhment for crimes. In England, Felonies, &c. are offences puniſhable at common law, and the rule is, that "ſtatutes made in affirmance of common law; or to ſupply the defects of common law, are to be conſtrued according to the rules of common law." 10 St. Tr. 436, M'Daniel's caſe; and Hobart 98. If an offence is declared to be Felony by ſtatute, that moment the common law acceptation is applied to it and the acceſſories as well as the principals are ſubjected thereto, and puniſhable by the common law principles. It is of no conſequence, therefore, whether the ſtatute mentions acceſſories or not; they are puniſhable under the common law. Now, Piracy was not conſidered a crime at common law; 1 Hawkins's Pleas, ch. 37 p. 152. But a ſtatute made it puniſhable with death, and it was then declared felony, and thus the aiders and abettors were involved, as in all other caſes of felony.

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Now, Sir, if we examine the cases by analogy, we must consider that we have no common law here, and, consequently, no case being subjected to common law doctrines and usages, leaves all crimes in the same situation as Piracy was in G. Britain, so that there can be no aiders or abettors in it. Crimes which are not under common law, but which are punishable by statute, where accessories are not mentioned, those accessories cannot be punished. The gentleman might therefore have his choice: he must either admit of the existence of the English doctrine of common law and *constructive* treasons here; or he must admit of its non-existence, and to our statuary provision, which excludes the common law of the several states, because Treason in one state is the same in every other. Such was the opinion of that Congress who enacted the law for the punishment of Treason.

I come now, may it please your honors, to consider what construction the act of Congress will bear. The act of April 30, 1790, Grayd. digest p. 61 defines Treason in the same words as the constitution did: and it is doubtless that the framers of that case took it for granted that that part of the constitution remained a dead letter until the time the act was passed. But, neither in the Constitution, nor in the act of Congress, is a single word said about accessories in Treason, although aiders abettors, assistantsprocurers and advisers in cases of murder, robbery, piracies, &c. are mentioned; and punishments enacted for them, if connected either before or after the fact; or if harbouring persons after full conviction, guilty of such crimes, or setting a traitor at liberty, after his conviction. See the 6. 10. 11. 12. and 16 sections of the judiciary act. Now, certainly, if the rule of abettors, &c. in Treason as used in England, had been thought necessary, or intended to have been adopted by statute in this country, why was it not inserted in this act, where there is a specification in what manner abettors, &c. in other high crimes shall be punished. Now, surely aiders and abettors in *Treason* would have been taken in as *particeps crimines* (if it had been intended by the Legislature) as well as in other crimes: and this idea is strengthened by referring to the 23d section, where rescue is spoken of—"if any person or persons, shall, by force, set at liberty, or rescue, any person who shall be found guilty of *treason, murder, or any other* capital crime, &c.—he shall suffer death." It is also enacted that if a rescue is made of persons imprisoned on suspicion of being guilty of any of the aforesaid crimes, fine and imprisonment shall be imposed.

Now, Sir, according to the gentleman's doctrine, *all* are principals in Treason, whether procurers, or receivers—*before* or *after* the fact; and there is no distinction. This is absurd, because there is a manifest distinction in the Law between the punishment of those who receive or harbour a Traitor after conviction, and

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one before: the one being punished with death, and the other fined in 500 dollars and imprisoned one year, what must necessarily be the inference from this correct view of the statute on the subject? Why, Sir, that Congress had no idea that aiders and abettors in Treason were comprehended within the constitutional definition; and that was the reason why they did not mention aiders and abettors in that crime, whilst they did mention them in *murder, robbery, piracy, &c.* I hold it to be a sound rule of Law, that the naming of a punishment for a crime in one instance, or of one species; and not naming it in another, excludes that which is not named from the same punishment or nature, or, more properly, that the expression of the one, is an exclusion of the other. But even the construction of the English Laws do not include aiders and abettors in Treason as principals, except when they were declared to be such, and it is a palpable misapplication of terms to fix that construction upon them.

To prove these positions, Mr. W. quoted 1. Hale's pleas 6. 1, ch. 24. p. 258, and p. 275: St. 25 Ed. 3; 1 Mary, 26 Hen. 8, 3 ch. and 27 Hen. 8 ch. 2. where aiders and abettors are mentioned but where they were not, there must be a conclusion that they were not meant.

But, Sir, the framers of our Constitution did not intend to leave the instrument to construction, or to suffer future legislatures to enlarge Treason—their object was to perpetuate to posterity a well defined instrument—one that could not be mistaken in its sense; and so the framers of the judiciary Law understood it: they knew that it was not formed merely to keep the several states in union, but also to perpetuate the liberty of the people, that posterity should not be subject to constructive Laws. Why is a republican institution granted to us in that instrument? Is it not, Sir, for the public good, and for the protection of the liberties of the people? and that is only to be effected by such an established form of government as will secure to us the advantages intended to be conveyed. The best means to perpetuate that liberty is to guard against constructions; and those gentlemen mistake the means for the end who attempt at the form, while they neglect every thing like the substance. In ages of despotism, whenever a person was marked out as a victim, it could always be effected by a charge of Treason; and a conviction was sure to follow: this, Sir, our convention and our legislators knew that even a republican government might not be proof against the evil, except it was particularly guarded: they knew that if a majority of the people could be set in array against any individual, unless he had some legal or constitutional ground to defend himself by, it was in vain for him to depend upon sympathy, and he would be undone, however worthy and virtuous. To evince this, we need only look back to the sanguinary time of Robespierre, when public sympathy appeared to be annihilated.

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When I ſpeak of ſanguinary times or blood thirſty men, I wiſh not to be underſtood as having any particular reference to any gentleman or caſe, but mention it merely in an abſtract ſenſe. But the danger of this arbitrary power was known to the people of the United States, and knowing this, they anticipated a proviſon: (I hope in God thoſe times are not now arrived and never may be in this country) they eſtabliſhed the principle that no man ſhould be puniſhed for Treaſon except he had actually levyed war againſt the U. States, or adhered to the enemies thereof. Now admit of the doctrine of conſtructive treaſons, and this principle will be extinguiſhed, but the plain and perſpicuous language of our conſtitution removes the caſe beyond all poſſible doubt, and it can admit of no poſſible change. Our convention had the volums of human nature unrolled before them—the ſpirit of human liberty was known, was underſtood, was felt by them—they knew that perjury might be enliſted againſt any individual—they knew that innumerable things might be brought as charges againſt a man; and therefore they ſaid that Treaſon ſhould "conſiſt only in levying war againſt them, or in adhering to their enemies, giving them aid and comfort. No perſon ſhall be convicted of Treaſon unleſs on the teſtimony of two witneſſes, &c. Thus, as was obſerved by my friend Mr. Lee the other day, there muſt be *an open deed* of war committed. Take away this, Sir, and you open the door immediately to conſtructive Treaſon! and what has a government to do, if it determines to make a ſacrifice of any devoted individual? [I argue on the abſtract principle,] An inſurrection might take place in New-Hampſhire, but there is a man in Georgia, and who has never been out of the State, is charged with having connection with it, (perhaps he is a back woods man, going out with his gun a hunting, or there might be ſome aſſemblage of men, for ſome innocent, or unknown purpoſe) what have the government to do, in order to implicate this man with the inſurrection? It is known that the inſurrection has exiſted and therefore it is an overt act—they prove that certain perſons have committed Treaſon, or have been guilty of Inſurrection, and perhaps it can be proved by 50 perſons, but the connection of this man with it is unknown in Georgia; however, being charged there with a connection, he is carried away to New-Hampſhire: a Jury is impannelled by the Marſhal of the Court, who is an officer elected by the government, and who is removeable at pleaſure, or whenever he ſhall diſpleaſe them, what is to be done? The proſecutor proves the inſurrection and then brings one or two witneſſes (one perhaps might be enough) to ſwear that the perſon accuſed was connected with it; thus, he is convicted of levying war againſt the U. S. in connection with people he never ſaw; and at a place where he never was in his life. But, it may be argued here, that any man is liable to a falſe accuſation:—this is true: but where is he to be tried?

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Is he to be tried where the profecutor pleafes ! The profecutor fays that he was connected with the Treafon, but he fays, he can prove that he never was upon the fpot. But it feems that proof would not avail him in this crime, which is contrary to all others, if the gentleman's doctrine is right : where is the Conftitution during all this time ? What fafeguard is this to an individual ? He muft conclude it to be no fafeguard to him, but that he was convicted for a Treafon of which he knew nothing, in a place where he never was, and with people whom he never knew, or faw. If, Sir, the Conftitution means no more than the gentleman pretends, of what avail is it to us, or what would it be to fuch a man ? It means nothing.

But fay the gentlemen, if this be the cafe, a conſpiracy to levy war means nothing, and will not be puniſhed at all. Be it ſo, Sir. If the Conſtitution did not ſee fit to truſt the government with it, be it ſo. But, ſay they, are not conſpiracies to levy war puniſhed in England ? I anſwer that they are, but what means conſpiracy to levy war there ? Why all the caſes are a conſpiracy to kill the King, and there is no other, but that of regicades. Hume's hiſtory of England 2d vol. p. 487, ſpeaking of the ſtatute of Edward 3d, acknowledges this to be the fact, and even the ingenuity of the lawyers of this day are not able to prove that a conſpiracy to levy war, is war levied, or that it ever meant any more than a conſpiracy againſt the life of the King : which, I cannot preſume will be applied in any American caſe.

Again. Gentlemen may argue that their indictment will ſupport them. But, Sir, they indict us for *doing* the act, and not for *conceiving* it. And, whatever the form of their indictment might be, it cannot operate in a Court of law in ſuperiority to the Conſtitution and laws, which know nothing of aiders, abettors, procurers or receivers in treaſons. Therefore we ſhall contend, that the conſtitution and laws of the U. States, and not the Engliſh conſtruction attached to them, muſt be the guide, whatſoever indictment might have been preſented.

But, Sir, it will be ſaid that the deciſion of the Supreme Court in this country is directly againſt us. Let the opinion of the Supreme Court ſpeak for itſelf, and we fear not to depend upon that deciſion even. [See paragraph 6 of this opinion, in the ap.] If this opinion is to be conſidered as concluſive authority, then the Court are bound to ſupport the principle which ſhall be advanced : but if they do, they muſt ſupport every *obiter dictum* whatever, that any Court ſhall eſtabliſh, and particularly the Supreme Court. But I never will admit that a Judicial body can become Legiſlators, and *make* laws ; but I will admit of the doctrine that the gentleman advanced the other day on the ſubject of " extra judicial" opinions. This deciſion I take to be of the ſame authority as though the Judges had decided a point in their chambers, when there was no caſe at iſſue before them.

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Now if there was a case of a person before them who had *levied war* against the U. States, surely there would have been the arguments of counsel on that case; but, I will appeal to gentlemen present, who were there, whether that point was ever even touched by any gentleman of the bar, or whether it was not a mere *dicta* of the Court without a point being in dispute. That a point of law not being involved in, but attached to a case, is not to be considered in the way of a decision, I will appeal to all authoritative opinions. I have frequently heard Chancellor Pendleton say, that such decisions were not to be considered as authority, *because the point did not turn upon the opinion; and because the point was not argued*, and made without sufficient consideration: it was merely stated *arguendo*.

Sir, I will take an instance of this mere *dicta*, as a practicable illustration, as furnished by the Court in the insurrection in Pennsylvania. We all know, that there, aiders, abettors, and procurers were not sought for. I will not mention names, because they are, perhaps deservedly kept out of view. But those who were the movers, we know, were never punished, nor ever indicted, whilst the actors, and those only—those poor men who were found in it, and not those who set it on foot, were punished, or tried.

I must here, Sir, indulge the feelings of my own mind; and declare that it is not merely the case of my client that I consider it necessary to take up so much of your honours' time about—while I feel for the safety of my client, I must express my feelings for all the citizens of the U. States; and for posterity. Yes, Sir, I feel for my children and for my country, because the safety of *all* our posterity, and of our fellow citizens, is concerned. There is no safety; and our government is a mere tyranny, if they are to have the power of doing what they please in a Court of Justice. I see, I feel for the danger to which my posterity will be exposed; and it is upon this ground and this only that I have indulged and shall continue to indulge those feelings which the case appears to demand. My client, Sir, has other grounds; upon which I believe I shall be enabled to prove to this Court, that it is impossible for the attorney to succeed in this prosecution.

I have now, may it please the court, gone through the point which I contended for, not as it related to my client, but upon the abstract principle. My argument was not intended to refer to the government, nor to any part of it: as a government I respect it, and trust that I ever shall: it is to the principle alone, I referred, and not with any relation to persons or political principles.

I will now go on to say that, even admitting the constitution to be different from what I suppose it to be, this charge of treason cannot be supported by the present indictment. I take it

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to be a fact, that the evidence *must* support the indictment; and therefore I contend that the profecutor muſt prove the facts as laid in the indictment. And that it being admitted that Mr. Burr was not preſent at the time or place laid in the indictment, they muſt fail in their proſecution.—That conſpiring to levy war is all that they can prove; but for the *acts* of others, under our conſtitution and laws, no man can be puniſhed; and that proving the fact to exiſt merely, can be no proof againſt any individual, without thoſe facts can be brought home to him. This is not founded upon arbitrary principles, but upon the impreſcribable laws of right, let the crime charged be what it may. The indictment, let the charge be for what it may, ſhould identify, minutely, the crime charged, and that nicety ſhould be ſtrictly conformed to by the Court; but our objection to this indictment does not relate to that critical nicety, but to a flagrant inconſiſtency. It may have been a ſubject of objection that we did not make this motion ſooner, but it was impoſſible that we could until we had the opportunity to ſee the indictment. It was impoſſible that we could know the facts that the proſecutor had intended to prove: he did not know but it was intended to be proved that he was at Blannerhaſſet's iſland where the indictment is laid. But knowing that he was not there, he came, perfectly ſatisfied that nothing but perjury could produce a conviction, ſince he knew that no perſon could levy war againſt the government without he was perſonally preſent. How could he expect to be charged through third perſons to commit this crime. Now the wording of this indictment is ſo ſpecific as to charge Col. Burr with having committed this treaſon at Blannerhaſſet's iſland, where he is acknowledged not to have been; and "with divers perſons unknown;" and yet now it is charged that he was known to be connected with Mr. Blannerhaſſet, Mr. Smith and Mr. Tyler!

It will be objected that, if he is, or is not, guilty, he muſt know it, and therefore, it is of no importance whether there is a ſpecification in the indictment or not. Why, Sir, were this doctrine true, it would prove too much—it would be even ſaying that there was no occaſion for an indictment at all? Now, I think it might be poſſible that a man might commit an act, and not know it at all, according to this mode of reaſoning. I really believe that Col. Burr knew nothing of theſe men being at Bl's. iſland; but at any rate it has not been proved that he knew any thing of their being there. Now, Sir, how is he to be informed of theſe things? Is it to be by rumour and public clamour—or, is it to be by a ſpecification in the indictment itſelf? I preſume the latter, but even that does not declare that he is to be tried for being connected with others who had levied war at that place, but that he, together with certain other perſons unknown, did commit treaſon at a certain place (where he was not) by levying war, (when, in fact, no war was levied.)

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But, Sir, there is another and an important defect in this indictment; the proper wording of an indictment for treason in levying war should have the word "*public*" *war* inserted; but, on the contrary, the indictment does not even pretend to specify that this was a *public* war. The words are, that he did "ordain, prepare and levy war" &c. So that the act might have been perfectly private. [To be sure the gentleman does not pretend to prove that it was public, since Mr. Blannerhasset's groom, nor any other person who was present, knew any thing about a war, or warlike appearance in the persons who were at the island.] But that it is necessary to insert the words "*public* war" in the indictment, I refer to precedents 8 St. Tr. 219. 9 St. Tr. 543 Tremaine's pleas; and Fries's trial 17: in all of which, and in every other case, that word is inserted as a part of the charge. In every correct indictment, the prosecutor must not only charge he levying war, and the particular overt act, but that it is *public* and *known*, or else it is no war at all. Perhaps the attorney might not have known what was in the indictment; perhaps he might have entrusted it to his clerks by setting a book of precedents before them. If not so, was it done to make it soft to the Grand Jury, that they should not be excited to enquire what *public war* had been committed. I will not, however, presume to say that it was omitted by design: it might have been by accident. But, Sir, where is Col. Burr to go, to enquire, what public war had been committed in which he could be involved, so as to produce a charge of Treason? There could be no ground upon which he could conjecture it. In short, he had no right to conjecture, but to have had it specified, agreeable to perpetual precedent, for what charge he was indicted.—These observations are made to shew that there is no ground to *presume* that we had any knowledge of the act that is supposed to have been committed.

I come now to enquire into the nature of precedents in relation to *specification* in indictments. I know of no cases where *special* indictment could be dispensed with except that of Sir N. Throgmorton, in the time of Mary 1. recited in 11 St. Tr. 73, and cases under Judge Jeffries, of which we can find nothing certain: or if certain, they surely could not be called up as precedents at this period, nor in this country. Somerville's case in Anderson's reports, p. 186, called for an argument upon this point, wherein it was finally settled, after great consideration, that the form ought to be special in the indictment, where there was a conspiracy to do any act of Treason. This indictment was for conspiring to kill the King.

Mr. W. here read 1 Hale's pleas, 280, and referred to the act of Hen. 8. to prove that there could be no such a thing as a person committing Treasons of the descriptions there recited without a personal presence, and concluded that it was as physically

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impoſſible for Mr. Burr to have committed this Treaſon at Bl's iſland, he not being perſonally preſent, but in Kentucky at the time. That it was an immutable rule of nature, that one body could not be in two places at the ſame moment; and it was admitted by the proſecution that the accuſed was in Kentucky at the moment of this alledged Treaſon in Wood County, Virginia. The overt act may or may not conſtitute the Treaſon, but of that, the circumſtances ſtated in the Indictment ought to ſhew; and the evidence produced upon that indictment ought to be conformable. For inſtance; a perſon indicted in England might be for "rebellion." Now he might have been concerned in the rebellion of 1715, and likewiſe in that of 1745; he might have been tried and acquitted of that in 1715, or he might have been only in that of 1745. Now, ſurely, for the ſake of giving him warning of what he would have to meet, it is neceſſary to ſpecify the particular act or acts which are charged; but lay as many overt acts as you will in the indictment, it is but one war; and the overt acts are mentioned by way of ſpecification of that war, let the number be what they may; and the evidence upon that ſpecification is offered to prove the war. So in caſes recited of Treaſon by conſpiring the death of the King, you charge the conſpiracy, and, in order that the party ſhould know how to form his defence, you ſtate the overt acts. But, Sir, if there are 20 overt acts laid, there can be no reaſon, from that, that he ſhould be tried 20 times over, becauſe it all muſt point to the ſame Treaſon.

But, in any event, no man is to be made reſponſible for the acts of others; or if he is, he ought at leaſt to be told that he was concerned in the acts of others. They charge Col. Burr with levying war with *perſons unknown*. Now, Sir, we are charged with acting with thoſe *unknown* perſons by relation; and when we were not there. This is contrary to common reaſon and propriety. Engliſh precedents in indictments are directly contrary to this: becauſe, when perſons were connected with others, thoſe others are always named. See 1 Tremaine's pleas, 279—Gerrard's caſe; James Duke of Monmouth's caſe, Hambden's caſe, 307 ib. 2 vol. do. 281 Hewit's caſe; Mordaunt's caſe 291 ib. 4 St. Tr. 132, Corniſhe's caſe. Theſe all conformed to the rule of Law, that where the charge was laid, all the correſpondent circumſtances ſhould be recited, or, otherwiſe, no proof of thoſe circumſtances ſhould be adduced. What caſe can it be conceived to be more neceſſary to make a ſpecific charge in than in the preſent? But, on the contrary, we are only charged with others, by relation; and yet, they tell us that theſe others were *unknown!* But, they may ſay that we know them now. How can we know them? I beg the Court to obſerve to what a latitude ſuch a doctrine might be carried. An act of Treaſon might be committed ſeveral times at one ſpot—ſay Blannerhaſſet's iſland—

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not a private war, like this, but a public war: Now, could Col. Burr tell which of these acts of war he was meant to be charged with, or with whom he was supposed to be connected, by such an indictment as this? He cannot be prepared to answer, when he knows not what will be put to his charge. Gentlemen might say this is an extravagant supposition, but it is not so, if viewed in a proper light. Suppose instead of the spot being on Bl's island, it was an English case, and charged in *London*, where these things frequently happen, and half a dozen riots might have happened in a short period, say a year: suppose an indictment to be brought against a person for committing a Treason with "persons unknown:" now how is it possible that the person charged should know to which of those acts the evidence was intended to be brought, or how is he to meet the charge by counter testimony? I submit, therefore, that no evidence of the acts of third persons to charge him with levying war can be received, when it is admitted that he was not present at the war, but was stated to be present by agency; and that this indictment cannot be sustained.

But this argument has another bearing.—Once establish it as a principle, that a special indictment is necessary: that you are obliged to charge the matter specially; and are not left at large to a general indictment "that you did levy war," and then the argument of the constitutionality applies at once, because you fall exactly within the rule of receivers after the fact; and are not made liable, since only acts can be construed to come within our doctrine of Treason. The indictment, even in England, must be special, although accessorial Treasons exist: how much more so then is it necessary to have a special indictment in this country? I will venture to declare that without it, no indictment can, on my account, be sustained.

Ch. Justice. But may not the levying of war, generally, be charged; and then the overt acts be specifically charged?

Mr. Burr, It is admitted, Sir, that I might be charged generally in that sense, if I had been at the spot: but this brings us to the Constitutional question. We contend that it is out of the pale of the Constitution; and if so, there must be a demurrer, even had it been specified that such a war had existed, and that I was at another place, at the time.

Mr. Wickham. It is admitted that such a charge would be necessary, even in England, but it is more necessary here. Now, Sir, if it is proved that a special indictment is necessary, then no indictment can be good that is not special.

There is another inference to be drawn from this argument: that if it is specially laid, it must be laid to have been committed in the place where the act was done: not the act of levying war itself, but that which makes the person a Traitor by relation: the act of *relation* should be laid where the assent, or procure-

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ment took place. If a perſon is guilty, it muſt be done by the perſon himſelf, and at ſome certain place or places.

It may be objected that all are principals in treaſon, and therefore he may be ſuppoſed to be preſent by relation, as a participent in the act. This doctrine would prove too much: it would prove that acceſſories after the crime, being principals, muſt be tried where the crime charged was not committed; this is contrary to the genius of our law, and therefore is inadmiſſible. Lady Liſle's caſe may perhaps be termed a precedent, but we have no objection to the gentleman taking the benefit of it. If the treaſon is proved, and that doctrine be contended for, it is incumbent on them to admit of another fact, to wit: that one body can be in two places at the ſame identical time. See 4 Hume's Hiſt. Eng. 388. Lady Liſle's proſecution, and for which ſhe was executed by order of Judge Jeffries, was for "harbouring and concealing a Mr. Hicks, a preſbyterian miniſter, of the duke of Monmouth's party, though he was not attainted; and his name was not in the proclamation—and he was one who was a ſtranger to her." Sir Nicholas Throgmorton's caſe is for aiding and aſſiſting in Wyatt's rebellion, in 1544. 1 Mary before Bromley C. J. K. B,—1 St. Tr. 68 &c. The war was levied in Surrey, and he was marching for London, but before he got to Temple Bar, (the entrance to the city) his followers all quitted him; and he was taken. He was tried at Guild Hall, in Middleſex. This, to be ſure is of the ſame nature as the preſent: the war was commenced in Kent or Surrey, and he was taken in Middleſex. But can gentlemen—will they preſume to build a doctrine upon ſuch data, where ſuch men as Coke, Bromley or Jeffries preſide; and in ſuch days as thoſe of Mary and Charles 2? This argument would prove that precedents brought from any time; and actions done any where, might be received as precedents? It is clear, Sir, that the rules laid down in the Engliſh books are in direct oppoſition to ſuch a doctrine. Now, at common law, if a felony was committed in one county by A, and B was an acceſſory to it, in another, B could not be tried at all, 1 Hale's P. C. Ch. 57. p. 623. It is not pretended however that an act could not attach in ſuch a caſe, if it can be found, and therefore, if it is puniſhable at all, our Conſtitution and laws muſt point it out, ſince common law can have no operation. Herty's digeſt 59. art. 8. amend. conſt. "In all criminal proſecutions, the accuſed ſhall enjoy the right to a ſpeedy and public trial, by an impartial Jury of the ſtate *and diſtrict wherein the crime ſhall have been committed*," &c. Now, according to this unerring rule, if Col. Burr had committed an offence, where was he to be tried, but where he adviſed or aſſented—if any where. Now, this doctrine was not meant to be an illuſory thing; or a mere ſet of words, but an eſſential doctrine. And therefore a citizen of Georgia, for a crime charged in Georgia, cannot b

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tried in New Hampshire, nor any where else, but in the district of Georgia.

But, Sir, if all these points are against us, (which I cannot even apprehend) there is one in reserve, upon which we cannot fail; and had the case been of less importance; had I not felt it my duty to state what I have, I should have thought it fully sufficient to all the purposes of this case, to have placed a full reliance on *this point*, and this only.

It is this: That if aiders, procurers or abettors of treason are punishable at all, yet their guilt is *derivative*; and can only be established by legal proof of guilt; and there is no legal proof of guilt short of this: that the *principals* are guilty; and that a *record of their conviction* be produced in Court. And then, only, their connection with the convicted person will come in.

I should not have brought forward this point; and it was far from the wish of my client to have mentioned it, but from his being charged as an accessory, in the indictment. It would have been an act of justice due, not only to him, but to the gentlemen, who are also charged, to have withheld this point, had they not been indicted, and had not the attorney taken the course which he has thought proper to pursue. In point of propriety, therefore, they ought to have been first tried. Messrs. Blannerhasset, Smith and Tyler, (who are respected, and very deservedly) who are charged as having been present at the scene and time laid in the indictment of Col. Burr, are not held up to the U. States by the peculiar epithets of "arch traitors." It has, to be sure, been held up to the public, that they should be punished; but they would have assuredly been more disposed to prosecute them with activity, if they had believed that their conviction would have produced the conviction of Col. Burr. These gentlemen therefore owe not their safety to the tenderness of the prosecution. But, Sir, though I do not attribute their safety to any such a source, yet, I am supported by law to say that except there be a record of the conviction of some person who was a principal, in the treason, it is impossible to proceed in the trial of Col. Burr, who is charged as an aider and assister only, or to produce any evidence against him.

If I am right here, Sir, the case is at an end. This is the rule in all felonies, of whatever nature. Receivers, aiders, or accessories, of whatever description, cannot be tried (and it is so in treason) until after the principal shall be found guilty; and a record be produced of his conviction. But gentlemen will urge that this doctrine does not apply to treason, because there are no accessories in treason, but that all are principals before the fact. The rule is general, and applies to accessories, as well those after, as those before the fact. [Mr. W. in supporting his position, referred to 4 St. Tr. 130 and 137, and to the acts on that subject, of Wm. 3. but whatever accessories it might

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apply to, it was always neceſſary to ſhew the conviction of the principal, to ſupport the acceſſorial guilt. Lady Liſle was convicted, attainted and executed, but the principal had been tried and convicted; but, this being a lady of fortune and family, in the reign of King William, there was a reverſal of the attainder.

Now, as aiders and abettors after the fact are as much principals as thoſe before the fact, the ſame rule applies with equal force; and therefore the guilt of the accuſed in both inſtances, make a conſequential crime in acceſſories; but that guilt muſt firſt be proved. For certainly if the crime never was committed, there never can be acceſſories to a crime. 1 Lord Hale 613 is an authority upon the true mode of reaſoning on this point: for thoſe certainly who committed treaſon in the firſt degree ought to be tried before thoſe who are charged in the ſecond degree, elſe it might be poſſible that the man who is charged as ſecond, might be convicted, whilſt he who is charged in the firſt degree might be acquitted. Now place this doctrine to the preſent caſe: Col. Burr is charged with treaſon, as the aider and abettor of Mr. Blannerhaſſet &c. Mr. Bl. is not tried, and it is uncertain whether he will be convicted when he ſhall be tried (if ever) and therefore Mr. Burr, who is charged as an acceſſory, might be convicted, whilſt the principal might be acquitted. The attorney ought therefore to prove, and he muſt prove, firſt, that the act was done, before he can be let in to give any evidence whatever as to who was concerned with it, eſpecially as to perſons charged in the ſecond degree. 1 Anderſon's reports 109. 2 Hale 223. So, referring to Somerville's caſe, where the principal was firſt tried; and then the acceſſory, Lord Hale thinks it a regular courſe, in indictments, firſt to ſtate *ſpecially* that the perſon was an acceſſory, for nothing can be got by the proſecutor in not ſtating it, ſince whether the accuſed was a *receiver* after, or an *aider* before the fact, he cannot be guilty, if the principal is innocent. Therefore, to prove that Col. Burr was guilty, you muſt firſt prove, concluſively, that Mr. Blannerhaſſet was guilty. But, Sir, this objection meets the caſe at its threſhold; and you cannot proceed farther but by producing the conviction of the parties who were preſent: or thoſe who were preſent at the time of the treaſon charged. See Foſter 341 to 346. Now, Juſtice Foſter contends, that, in every derivation of treaſon, there ſhould be evidence of the conviction of the principal. It will be obſerved that he goes at large into the queſtion; and that all the exceptions which are made, relates to compaſſing the King's death, in which there can be no acceſſories, becauſe all are principals. 1 Eaſt, 100. I do not, however, pretend to quote Eaſt as an authority, generally; but, becauſe his doctrine, on this ſubject is well ſupported. There is ſome little inaccuracy in him which Hale or Foſter would have avoided.

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As to all being *principals* in treaſon; we know that in the treaſon of compaſſing the King's death, all are principals; but there are other treaſons in the Engliſh rule; if one adviſe or encourage another to do the act, he would be a principal in that ſpecies of treaſon—but, if the other ſhould forbear to commit that act, he would be innocent. This, as the authority ſtates, "depends entirely upon the queſtion whether the perſon (the principal perſon) has, or not, been guilty of the treaſon—which, can only be legal evidence by his (the principal's) conviction.

We come here, Sir, to defend ourſelves againſt the indictment, which is ſuppoſed to inform us what is againſt us; and to what charges we have to anſwer. We rely upon legal evidence in the caſe; and we ought to fear no other. Anderſon 109, in reference to Somerville's caſe, is expreſs upon the ſubject; and there the *procurers* could not be convicted. This turns upon the very point, and the ground of deciſion in this caſe will prove to your honours that the ground we have taken is correct, as to ſpecification.

There is one writer, however, who, in general terms, has ſtated it to be ſomewhat otherwiſe. Leech's Hawkins, 2 vol. ch. 29. ſect. 2. p. 440 in the note. He lays down the *general* rule that, in *treaſon*, all are principals. But, however, this is happily characteriſed only to reſpect the death of the king: which, conſequently, cannot refer to treaſon in this country. Whether we refer to Foſter, Hale, Hawkins's Eaſt, or any other writer, we ſhall find that the *agency* can only be eſtabliſhed by proof of the guilt of the principal, in his conviction. And the authorities all agree in this point, ſupported as it is by reaſon and by juſtice: and it is beyond all poſſible doubt, becauſe the authorities declare uniformly in our favour. If it be anſwered that there is no adjudged caſe that is applicable to our argument, we reply that we are at leaſt upon equal terms with our adverſaries, and if there are any, they all apply to receivers and aiders after the fact, which are not applicable to treaſon in this country.

I have gone through all the points, Sir, that I conſider neceſſarily attached to this ſubject. There is another point however, which on account of its immenſe importance, not particularly reſpecting this caſe, but all others of this nature that may come before a Court. It is, that before any evidence can be given—(even admitting every one of theſe points to be againſt us) towards the connection or participation of Col. Burr in the Treaſon ſaid to have been committed, the overt act of Treaſon itſelf muſt be proved. And of that the Court muſt Judge. Upon this ground we fear not to meet the teſtimony: admitting all that has been ſaid: even admitting the declarations of that unhappy wretch who was brought here to give teſtimony reſpecting the tranſactions on Bl's iſland, who was ſo ignorant that he could not

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even name the month when he was there: and who was so unprincipled as to declare, at one time that arms was levelled at Gen. Tupper, when no one who was present besides knew of such a thing, and when himself even had differently related it. Admitting his testimony, even, to the fullest extent, and that (if the gentlemen please) it proves an act of war, yet this is a solitary witness, and the act and constitution require that there should be two witnesses to produce a conviction in cases of Treason. But if all of it is believed, we seriously declare that no part of the transaction bore the least semblance of war. Why, Sir, there really was a smile on the countenance of every gentleman, except the prosecutor, when they found what slender evidence he had to depend upon to support the charge of levying public war, or any war at all.

Here, Sir, I shall beg permission of the Court to rest; and proceed to a conclusion tomorrow morning, the hour of adjournment being arrived.

Mr. Martin arose to adduce some authorities for the consideration of gentlemen. 1 East 100; Bacon. art "Treason," letter C. Leech 234. 1 Hale 121. 1 East 116. 121. 123. 1 Hale 122. Foster 194.

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Mr. Wickham proceeded. He enlarged upon the nature of *derivative* guilt, and insisted that before there was derivative guilt committed, there must necessarily be a conviction of the principal: but here there had not been an attempt to bring forward the guilt of Mr. Blannerhasset who, to prove Mr. Burr guilty, must at least have been tried first. He quoted 2 Hawkins's pleas 440 ch. 29 sect. 2. Foster 364. 5. 2 Hawkins ch. 29 sect. 47 in the note.

He next proceeded upon the point last recited, which, if all the facts were proved, must militate against the prosecution.—Now, Sir, continued he, let us suppose that no evidence whatever could be produced against Mr. Blannerhasset, to prove his guilt, how then can any evidence produce the conviction of Mr. Burr, whose guilt, according to this indictment, must depend upon the guilt of the other. What, Sir, has been proved? a friendly meeting of a few adventurers, in a land speculation, on Bl's island! Nothing that was done there, had the least appearance of war, by any testimony that has been given, or that is pretended: for it has no bearing whatever on the charge. What can evidence of persons being in possession of arms amount to? Now, all the arms that we hear any thing about are a few rifles; and a few "shot guns," or fowling pieces. These are not necessarily military weapons—muskets and bayonets are.

Now, Sir, let us take a view of the nature of the country. The inhabitants are almost in the continual practice of killing

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game, and every man has his rifle or his fowling piece. This is no more extraordinary, or evidence of evil design than would be the poſſeſſion of a knife or a ſword. Conſequently, a number of perſons meeting together, for ſuch a purpoſe as theſe men were proved to be, having ſuch articles with them, cannot, for that, be called a warlike aſſembly. If in England a number of men with arms of any kind were to be found together, it would be thought extraordinary; and would excite ſuſpicion, becauſe it is not cuſtomary for people to carry guns; but the poſſeſſion of piſtols, either here or there would not create any ſuſpicions. Theſe circumſtances are no more evidence of a military aſſemblage to ſubvert the government by force, than as though the people had not been there at all: and it proves nothing in relation to the caſe. What, then, is to be the rule? Why, Sir, there muſt be evidence of a *Treaſonable* aſſemblage. For it might be proved to the Court that, in point of fact, it is an *honeſt* aſſemblage.

It will be ſaid, on the other ſide, that if the Court undertake to Judge upon theſe facts, they will invade the province of the Jury. But it is not the Jury alone who are to judge of the facts. The Court may direct the Jury in criminal, as well as in civil caſes to find a ſpecial verdict. The facts muſt be applied to the caſe; and the Court, as well as the Jury, have a right to find on the facts. The weight of evidence muſt undoubtedly be decided by the Jury; but of its relevancy, it is the province of the court to decide.

A number of caſes have been quoted in another branch of this caſe to prove the fact above adduced. See Deacon's caſe 20 Geo. 2. and Wedderburne's caſe. The facts muſt firſt be proved, and "that being done, acts of Treaſon tending to prove the overt acts laid, though done in a foreign country, may be given in evidence. Mc'Nally 505, 9 St. Tr. 558. Foſt. 9. But who is to decide upon this, the Jury? No, Sir, but the Court; and it muſt neceſſarily be the Court. So it is in civil caſes: A. employed B. to make a contract for him. Here is an agency. Now if a ſuit commences that reſpects the agent, the agency muſt firſt be proved before the principal is bound to the bargain. But who is to judge of this proof? Why certainly the Court: after that the party is let in with his evidence. This principle is farther illuſtrated by the right of a party to require a ſpecial verdict: and alſo by his right to demur to evidence, which is poſſeſſed by every one. Now if a Juror is withdrawn; and the caſe commenced *de novo*, or a ſpecial verdict is to be given, who is to Judge of the facts which ſhall lead to ſuch a reſult? Certainly the Court. This, Sir, is found law.

I come now, may it pleaſe your honors, to enquire—and it is a moſt important enquiry indeed; not only as reſpects this caſe, but, as it may affect the public at large; and our poſterity—what properly conſtitutes the crime of levying war?

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Ch. Justice. Before you go into this point, I will ask if you know of any cases in addition to those mentioned before, respecting the necessity of first proving the overt act?

Mr. Wickham. I consider Deacon's and Wedderburne's cases amply illustrative of the principle: and there are a number of other cases which I presume will be quoted to support the doctrine. The state trials, when the cases are recited at large will sufficiently prove the doctrine; and also that the Court is to decide upon the nature of the evidence. I do not say that the Court is bound to go into the full evidence; but there must be some evidence given, on the fact, such, as if legally true, might be sufficient to support a demurrer.

But what is the overt act, of levying war?

Mr. W. here referred to Mr. Hay's observations upon these terms.

Mr. Hay explained, and recited his argument upon the point; which he said was founded on the opinion of the Supreme Court. He trusted that the gentleman would not catch up a part of his argument without taking up the whole. On the question of where is the point at which an overt act of Treason does exist—he would answer that it was where there was an assemblage of men collected together to accomplish a Treasonable act by force, which it is their intention to complete, by force, before they separate. This answer was furnished by the Supreme Court. Now, the force which was meant to be employed by this assemblage, I take it for granted was intended to accomplish the object they had in view before they separated; and upon this the prosecution is grounded. I do not mean to say that they intended to accomplish their object before they quitted the place where they were collected: it is clear that their first meeting was only an assemblage for conspiracy; but the crime of Treason was attached to their conduct by their continuance in the act, which it was not their design to relinquish until they had completed the purpose for which they had assembled.

Mr. Wirt. I suppose the Counsel on the part of the defendant have the right to object to the production of any piece of evidence which they may think proper to disapprove of. If they came here to make questions, they have the right to propound any propositions touching that evidence. But, Sir, I suppose the Court have also the right to prevent them from confounding distinct propositions, so as to make a mixture in the debate of points which do not belong to it. On the other day the Counsel for the defendant rose to propound this question to the Court—that there being no evidence of the presence of Aaron Burr on Bl's island, we, not being able to produce any further proof of his guilt, he ought to be discharged. This day he opens with a totally distinct proposition; to wit: that the overt act, which we say is proved, is no overt act at all: and therefore that we ought not

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to go on with our corroborative evidence. I hope these questions will be separated.

Ch. Justice. When there are distinct propositions, the Court will decide them; but when there is a distinction in the argument only, how can the Court separate them? Now, if I understand the course of the argument advanced, it is continued under four different heads, or reasons: first, that Mr. Burr not being present, he cannot be charged with the Treason. 2dly. That under this indictment he cannot be tried, because it is stated to be deficient for specified reasons. 3dly. That the guilt being of a derivative nature, the principal ought first to be convicted; or that a proof of his conviction ought to be in Court before the accessory can be tried. And now he is, 4thly, about to require it to be proven that the act charged was "an overt act of levying war against the United States;" and therefore enquires what is levying war. He says before any testimony can be let in to connect him with that crime, it is necessary to prove that there was an overt act of war: which he denies to exist.

Mr. Wickham. I really am very unfortunate in not satisfying the gentleman (Mr. Hay). I correctly quoted his observations, but what is his answer? Why, that his definition is the definition of the Supreme Court! [Here Mr. W. read a part of the opinion of the Supreme Court, which will be found in the appendix.]. Upon this, he relies: but he is not held out in his doctrine even from this authority.

I will now power, Sir, to examine his positions; he relies upon the decision of the Supreme Court; and thinks to make their definition of Treason to conform to his ideas. An assemblage of men on the island, without any publicity, without force, and, I may say, without numbers, is sufficient to constitute an act of levying war. Mr. W. read a part of the opinion, and of the opinion of the Ch. Justice at the time of first committing Mr. Burr. Sect. 5. Now it is evident that the gentleman on the other side considers that he has, by reading this paragraph of the opinion, produced a compleat definition: but, if he goes a little farther he will find, that the words "by force" sect. 8. is necessary to produce a Treason; and this is the opinion of Judge Chase in another case. I refer however only to your honor's opinion of the commitment, which expresly requires that there must be force; troops must be embodied and men must be assembled to "levy war."

But we are told that Fries's counsel laid down this principle. Why, Sir, it is well known that the declarations or opinions of counsel are not authority. But, their opinions do not come to the point. However, since their opinion of counsel are brought forward, permit me to give the opinion of the counsel for the prosecution, Mr. Rawle: p. 179 of the trial. He says that actual force is not necessary to make the crime of levying war, but

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the attempt muſt be made by terror, or by intimidation, with numbers ſufficient to accompliſh the object: provided the object be of a general nature. We will put this illuſtration: a body of men, ſufficient in numbers and in means, to take the capitol and all the property that is in it, is prepared: they march into the city, and find no oppoſition, becauſe they do that by terror of a number and warlike appearance which accompliſhes their object. This is denominated potential force: they obtain their object without the actual execution of force, though force ſufficient to accompliſh their object is employed. Mr. Sitgreaves, who aſſiſted Mr. Rawle, is ſtill more explicit.—p. 19. 20. "A tumultuouſly raiſing the people, with force, for the purpoſe of ſubverting or oppoſing the lawful authority of the government, in which thoſe inſurgents have no particular intereſt, diſtinct from the people at large," is the definition he gives of Treaſon. "It muſt be a war waged againſt the U. States." This is an important diſtinction.—"It muſt be avowedly levying war againſt the U. States." Juſtice Foſter to be ſure allows of potential force, but if you examine all his writings, you find that it was his opinion that actual violence muſt be uſed before the act of Treaſon could be ſaid to be committed. Now ſurely it would be an actual violence, if they were to go to the palace of the King, and order him away, if the force was ſufficient to compel his obedience: even though there ſhould be no act of war committed. We ſhall not find a caſe in the books that goes farther than this: *Vaughan's* caſe comes the neareſt to the proſecutor's advantage. He had been carrying on war againſt his country under a foreign commiſſion from a foreign prince (France) in a ſhip called the Royal Clencarty, but meeting with a ſhip of ſuperior ſtrength, he ſtruck without battle. There were two counts in the indictment: one for levying war againſt the King; the other for adhering to the King's enemies. Lord Ch. Juſt. Holt, on that caſe ſays, that marching with arms is levying war, if the act be of a public nature. The Court even doubted how far the ſailing with a French commiſſion, or privateering, would ſupport the proſecution ſince there was no open act of war done, but they depended upon that count which charged him with adhering to the King's enemies. I ſhall therefore rely upon the form of the indictment, and think it neceſſary to be proved that there was an *overt*, or *open* act of hoſtilitiy commenced and carried on. I do not know but I might have gone too far when I conſidered the indictment vitiated by the omiſſion of the word "public." I find that in the ſecond trial of Fries, the word public is omitted in the indictment, though it is in the firſt indictment, and is uſually inſerted. Whether, therefore, it is abſolutely neceſſary or not, it is uſeleſs to take up the time of the Court to argue. But this is not all that, between his indictment and his argument he thinks a minute omiſſion. It ſeems as though he thought it unneceſſary

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to prove military array; actual force, terror or intimidation as well as that the act ſhould be public: and he would make no ingredient neceſſary to prove levying of war—but that it might be committed, without any act, without arms, without force; and in private. If this is to be law of Treaſon, I know of no man who would be ſafe, becauſe the crime would conſiſt in a criminal intent; But, Sir, we have reaſon to felicitate ourſelves that the Laws nor Conſtitution of this country know of no ſuch a definition of *crime*.

Again. The gentleman's doctrine would leave no room to draw back: he takes away the *Cocus penitentia* entirely. Now ſuppoſe a war againſt the ſtate of Virginia is intended in the boſom of any man: but before he comes to the act, he repents and goes no farther, but withdraws altogether from his ſcheme: ſhall this man be puniſhed as a traitor, when he has done no traitorous act, but repented of it before its intended commencement? And ſo, if a body meet together and ſeparate without doing any thing, ſhall their aſſembling be denominated treaſon? Now what can he call the *intention* of a body of men, when, perhaps, there are not two of them who have the ſame ideas as to the object? Such a vague and uncertain ſet of ideas never can merit the ſerious regard of any Court, when they are intended to define ſo high a crime as treaſon. I truſt in God that ſuch doctrine will be never again urged in this country, becauſe it would introduce into this country the alarming doctrine of conſtructive treaſon, and, indeed of the worſt kind, by diving into the very thoughts and intentions of a man; and it would introduce worſe than the moſt rude and cruel times of antiquity. Suppoſing that ſuch horrid principles muſt be diſclaimed, and that thoſe rude times never can return, nor ſuch men be again found to exerciſe injuſtice; I will examine what is the nature of this caſe, upon the ground of the evidence which has been produced.

The firſt witneſs was Peter Taylor, who, being preſent, ought to have known what paſſed at the iſland. The Court have heard his teſtimony; and doubtleſs have paid accurate attention to it. There is not one word in it which proves the leaſt circumſtance of war. He ſaw 4 or 5 rifles among thirty men; and ſays there were a few bullets run. Now certainly their liberty to carry rifles and to run bullets will not be diſputed. But they had ſome powder. Why their rifles and bullets would be uſeleſs without that:—they had but a ſmall quantity even to kill their game with; and there was no military parade obſerved. But he ſaw another thing; he ſaw Mr. Woodbridge take up Mrs. Blannerhaſſet from the landing to the houſe! Now Mr. W. ſays he did not; that he was in bed at that time. Mr. Love, Mr. Bl's. groom and Mr. Woodbridge both declare as to the ſtate of things generally there: that all was peace and quietneſs, only to be ſure that they did not mean to be inſulted by any mob who might come there, perhaps to pull down Mr. Bl's. houſe, or do other damage.

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Mr. HAY. Does it appear fair, Sir, for a counſel to argue upon theſe halves or tenths of teſtimony in order to mitigate an offence, when we declare to the Court and to them that we have many more witneſſes, if we were permitted to produce them, that would give a *character* to this tranſaction. We can prove that the bullets were not run for the purpoſe of killing Squirrels and Hares, but for killing the people of the U. States, if they would not have let them take New Orleans without. Now, Sir, I aſk the Court whether there was ever ſuch a thing permitted in a Court of Juſtice before.

CHIEF JUSTICE. I underſtood, and it was ſo expreſsly ſtated, that all the teſtimony relative to the tranſaction at Bl's. iſland was gone through. It is urged that the proſecution have other teſtimony to produce, connected with it, and collected from other circumſtances, to ſhew the intention. Now the argument is upon this point, for it is contended that if the tranſactions on that iſland are all given in evidence, there is no right to go farther into the examinations until it be proved that an act of war was committed there. How far the evidence may prove that point, remains to be decided, upon the evidence.

Mr. HAY. It is my expectation, Sir, to be able to prove, not only a compleat union of all the proceedings, but the actual character of theſe proceedings. I wiſh to prove the junction of the forces, after they deſcended the Ohio to Cumberland iſland. And then to produce a view of their object in going down the Ohio and Miſſiſſippi, towards the execution of their deſign. This I conſidered to be the province of the Jury to determine; and therefore, I imagine a motion to ſtop the evidence, and to diſcharge the Jury, to be out of order. I confeſs that I never have heard a motion made upon the aſſumption of a point until now. I hope the gentlemen will not contend that this point was conceded. I told them and the Court, that I did not admit the propriety or applicability of their motion; and therefore the fact ought not to be aſſumed, that there was no more evidence. We ſay, Sir, that we have teſtimony; and we preſume to ſay that it ought to be gone through. I have never heard a motion made like the preſent, upon the mere preſumption that the proſecutor cannot ſupport his indictment.

CHIEF JUSTICE. I did conceive, and do now conceive that there is no ſort of queſtion as to the regularity of the motion now made; and that the court was compelled to grant it. I can aſſure the gentlemen that there is the moſt earneſt deſire in the Court to hear all the evidence in this caſe; but the Court is bound by the law to hear the argument of all the parties upon any regular motion, as much as to render a judgement. It certainly is a right at all times enjoyed to move for an argument upon the relevancy of any particular ſpecies of teſtimony; and the Court muſt hear the argument. The Counſel on the other ſide ſay

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that no testimony is relevant to the case, but such as is strictly attached to the transactions on Bl's. island. Now you declare that you mean to shew the guilt of the prisoner by extrinsic circumstances; and not the transaction itself. I have understood you to say that you have no more evidence of the transactions there. Now, Sir, I do not say that it is improper to go into the other testimony, but the counsel on the other side contend that it is: they say you are not to produce that testimony unless you first prove the overt act on the island. Therefore, now you have said that you have no other testimony, they are going on to argue upon the weight of what has been given, and upon the inadmissibility of any more. Upon this the Court is bound to hear them.

Mr. Hay. It is very extraordinary that they should argue against the introduction of other testimony, drawn from that which has been already produced, and which, of itself, must be, in its nature, partial.

Mr. Burr. I remind the Court of what passed in their presence. It was my earnest desire that every thing which related to what was called *the war*, should be given in evidence; and it was only for that purpose that I did not state the other point to the Court at an earlier period, or, indeed, at the opening of the prosecution. I waited for the evidence, in order to prove that this was not a war at all. Day after day have we urged the prosecution to come forward with the "overt act," and now at length we find that they have no proof of such a thing, nor the resemblance of such a thing. They cannot wonder, therefore, that we require an argument upon it, unless they consent to give up the point. And all the other evidence which they can bring will not make that treason which is not so in itself.

Mr. Wickham. We say, Sir, that having proved every thing that they can prove, as to what relates to the overt act, that it is not, *in itself*, an act of war; and therefore, all declarations, or all evidence that relates—even I will say to the *quo animo*, is inadmissible: for if there be no overt act proved, the proof of intention is not admissible by law. Now, Sir, how can I shew that there is no sort of evidence of the overt act, unless I am permitted to state what that evidence is? Mr. Woodbridge states that every thing was peaceable and quiet on the island when he was there; (which was the night of their departure) and every one else says the same. He is asked what passed between him and Mr. Tyler? He says that he would not oppose the constituted authorities of the country, if he should be attacked by authority, but should patiently submit—but if he should be attacked by a mob, who had no powers, he would resist. Mr. Dana perfectly agrees with Mr. Woodbridge. He passed over there and not a word was said to him, or a question asked, though the people did not know who he was. And yet this was the period of the ex-

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iſtence of this bloody war! Poole was employed by the government of Ohio to watch for Mr. Bl. and what does he ſay? Why he was half a mile off, and he ſaw ſome men with guns, or they might be ſticks, for what he could tell, and he obſerved a certain queſtion to be aſked when a boat was hailed. Now what was the true ſtate of this buſineſs? Mr. Bl's. men, and Mr. Tyler's men were both on the iſland. Mr. Tyler's people had been out a ſhooting, (as is common in the country; and as the evidence will prove) now, it was natural to ſuppoſe, that as they had not any connection, Mr. Bl's. men would not go for Tyler's, nor Tyler's for thoſe of Bl. and therefore it was proper to hail the boat they had belonged to. Now, Sir, I will even ſuppoſe that the name Tyler's boat might be miſtaken by the witneſs for I's boat; and that will explain the circumſtance: But be it how it may, it is no evidence of war, and it is impoſſible to conſtrue it to that meaning.

There is another witneſs, if I can poſſibly ſuppoſe that this man's evidence can deſerve the leaſt attention; and that is Albright's. Now, two witneſſes are requiſite to prove an overt act of Treaſon: but I will for a moment ſuppoſe that this man believed what he gave in evidence to be true. Why, Sir, that would not be a competent evidence of a fact: it is not legal teſtimony, however true. Gen. Tupper is ſtated to have come over to Virginia (Bl's iſland) to arreſt a man, from the authority of Ohio. Gen. Tupper is not examined as to this fact, but if he had he could produce no legal authority for arreſting a man in Virginia, and therefore, if it had been true that the pieces were preſented, which we deny to have been the fact, it would not have been an overt act of treaſon, becauſe he had no authority to lay his hand on any man in Virginia in the name of the ſtate of Ohio. But no warrant has been ſhewn, or proved to have exiſted. And, Sir, what is a good evidence to the contrary of that ſuch did exiſt, is that Gen. Tupper was with them and wiſhed them a good voyage. But to prove an act of treaſon, it is neceſſary to prove a real arreſt from legal authority; for without that a reſiſtance itſelf would have been no act of treaſon. Gen. Tupper is here; and the attorney might have examined him if they had thought it to their advantage: but I preſume it was not.

But, Sir, againſt whom is this treaſon committed?

If it is againſt any, it is againſt the ſtate of Virginia, becauſe it muſt have been under the law of Virginia that the proceſs was granted, or elſe it could have amounted to nothing.

But this man ſays that he ſaw a number of guns, at different times, equal to the number of men that were there. Now, how could he poſſibly know the number of guns that were there, when he confeſſes that he did not ſee them all together, but at different times. Now, it is moſt obvious, that if this can be called treaſon, any thing may be denominated treaſon, that any government

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may chooſe to make ſo. But the gentleman ſeems to think that the latitude of treaſons ought to be extended; becauſe, in a free government there is no danger but every man will have fair play. This argument might, at firſt ſight, appear very ſound, but if you couple with it a doctrine which was advanced the other day, that a majority ought to govern, we ſhall not find it ſo ſafe; for we may find from experimental writers on the ſubject, that factions are more felt in a free government, than under one which is deſpotic. We have our parties and our factions, to be ſure; but in the country governed by Buonaparte, or in his camps, there is no faction or party: but who would not prefer the government of laws? Upon the ground, therefore, of keeping us from the power of party, and fixing the principle of crimes, our Conſtitution and Laws were eſtabliſhed.

Sir, I have gone through what I had propoſed. Theſe are queſtions, which not only affect my client, but the citizens at large of this country: and I only obſerve, that when the counſel have to oppoſe this doctrine, it muſt be upon abſtract principles; and there is no ground beſides, of whatever nature. Indeed, they muſt contend, or admit, that the conſtitution of the United States, which was drawn with ſo much care and attention, is a dead letter—that the citizens of the United States may be hurried no matter how, from one end of the United States to the other; and be charged with the commiſſion of crimes where they never have been, and in company with perſons utterly unknown to them. All this, and more might be the conſequence. They might be tried under an indictment that does not even ſpecify what they were brought there for—They might be liable for crimes that are not even named; and connected with perſons that they never heard of. Indeed, they muſt go beyond that: they muſt even ſay that Judge Jeffries was right; and that all the moderate ſages of this country were wrong, before they can convict my client of treaſon. Beſides this, they muſt contend that the law of treaſon is totally miſunderſtood; and that it is whatever they pleaſe to make it—and that levying war againſt a government, is to be done, without arms, without military force, and without men! All this, and more muſt be contended for, upon this principle, wherever the crime ſhall be charged; and againſt whomſoever. I do not, here, pretend to charge the government: God forbid that I ſhould make the ſlighteſt reference to their being the authors of this proſecution, or that I ſhould aſcribe it to any of the gentlemen on the other ſide. I believe that both the government and they, would diſclaim any wrong action. But there may be ſome agents who would wiſh it; and who ought not to be truſted ſo far as they are in the concerns of the government. However, I wiſh to make no reflections, but to conſider the queſtion more as regards futurity, and not my client, who cannot be involved under this indictment.

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The principles themſelves and not my client, particularly, demand the attention of the Court; and ſolely upon this ground I have taken up ſo much of the time of the Court.

Mr. Hay then called forward *Iſrael Miller*, who was ſworn.

Mr. Hay. Were you at Blannerhaſſet's iſland on the 10th December?

Witneſs. Yes; I arrived there between the 7th and 10th December. *Q.* With whom? *A.* In company with Comfort Tyler, Iſrael Smith and others. There were four boats; and about 32 people. *Q.* Were the people armed? *A.* There were 5 rifles, and, I think about 3 or 4 pair of piſtols in all the boats. Theſe were all I knew of.

Croſs Examination.

Mr. Burr. Were you with them during their whole voyage? *A.* Yes, from Beaver I was with them, and went down the river with them. *Q.* You ſaw no more arms than you have related? *A.* Not between Beaver and Blannerhaſſet's iſland.

Mr. Hay. When you got to Blannerhaſſet's iſland, what arms did you ſee there? *A.* I ſaw one blunderbuſs, 2 pair of piſtols, and a fuſee, and thoſe were all.

Mr. Burr. How many bullets were run there? *A.* I do not know; I ſaw only one man running bullets, who had been out a hunting that day. *Q.* Did you ſee Gen. Tupper there? *A.* No; I was told he was there. *Q.* Did you obſerve any diſturbance of any kind; or was all peaceable and quiet? *A.* I ſaw no diſturbance. *Q.* Are you acquainted with Gen. Tupper? *A.* No. *Q.* Were you about the boats? *A.* Yes, ſometimes; and ſometimes at the houſe.

Teſtimony of PEARLEY HOWE.

Mr. Hay. Relate what you know of the tranſactions on the Iſland.

Witneſs. I was not on the iſland at all during the time gentlemen were there with the boats. I was applied to by Mr. Blannerhaſſet to make him 40 boat, or ſetting poles. On the 10th of December, I went to deliver them. After Mr. Blannerhaſſet and Mr. Tyler came from Marietta, I was called upon to carry them down to the landing, which is juſt below my houſe, on the Ohio ſide, where the flat which uſed to carry Mr. Blannerhaſſet's family was waiting to receive them. There was placed in the flat, a centinel as I took it to be; there were two men who had rifles. I offered to aſſiſt them to carry the poles down the bank to the flat, but they ſaid that they had men enough. Taylor was one. A neighbour of mine, Mr. Ellenwood, wanted to go over to the iſland, but they told him that they had orders not to take any body from the Ohio ſide of the river to the iſland. *Q.* Did you ſee any more arms than thoſe two men with rifles? *A.* None. *Q.* How many men did you

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see on the island? *A.* I did not know how many were there: I saw a great many going backward and forward every day. One of these men laid down his rifle on the bow of the boat, and assisted to stow away the poles; and the other had his rifle on his knee all the time. *Q.* Did either of those centinels that were keeping guard leave the boat at any time while they were there? *A.* No not at all.

Cross Examination.

Mr. Burr. How long were you with the flat? *A.* 15 minutes. *Q.* Did you know any of the men except Taylor? No, they were all strangers to me. *Q.* Do you know whether the two men who had rifles, came over in the boat, or where they came from? *A.* I do not.

Mr. Randolph proceeded with the argument as follows.

May it please your honours.

The range which has been taken on this subject by Mr. Wickham, would be a sufficient ground for me to dispense with the undertaking of following him: but I feel the weight of the subject to be of such vast importance, that I must indulge myself: I feel myself not merely bound by my engagement to my client, but invigorated by a sacred duty as a citizen of the community to do every thing in my power; that, if possible, the true principles of our Constitution and Laws shall be fixed: And for this reason, perhaps, we are heard at this stage of the transaction, and are justified by your honour's suffrage to go at large in the subject.

In treating upon it, Sirs, I shall take it up in four points of view:

First, I shall enquire whether there can be treason in levying war, without the employment of actual force.

Secondly, Whether, under the Constitution of the United States, accessories, which are so denominated in felonies, can be considered as principals in treason, in levying war.

There are two other points which I propose to consider, but which spring from the indictment and evidence.

1st. That no evidence of accessorial agency can be admitted.

And 2dly. That, if it were admissible, there must be a record produced of the conviction of the principal.

When I speak of the first position which I take, that there can be no treason without the exercise of force, I beg it to be understood by the Court, the Jury, and by all who hear me, that we make no dereliction of the plea of innocence: but, Sir, we mean to avail ourselves of every safeguard which the law affords us; and to make no apology for taking advantage of every principle of right; and most particularly so, when we declare, that it is intended to promote the public safety; and to adopt the true principles of law. If an apology were necessary, I should find it in an exploded principle, that "if treason be indeterminate,

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in any country, it will degenerate into arbitrary power." Partial as I am to my own country—believing, as I do, that it is the beſt government on earth. But I am told by the framers of the Conſtitution, that they apprehended that every ſpecies of evil might poſſibly be executed, when I find that they have bound, not only the citizens of this country, but the legiſlature itſelf, in that inſtrument, with reſpect to treaſon.

But, Sir, if I wanted another apology, I ſhould find it in the words of Mr. Jefferſon himſelf, who tells me that every man in the United States takes ſuch an intereſt in the affairs of his country, as to feel (perſonally) theſe affairs as his own. Upon this encouragement I might proceed.

Were I to want another apology, I would go into an examination of the qualifications of thoſe who are to ſit in judgment on the preſent occaſion: I ſhould enquire whether a proper verdict could poſſibly be given, whilſt there was an immenſe and avowed prejudice on the minds of the Jurors. If I need to go farther, I would ſay that if the doctrine of treaſon was not to be confined to the moſt preciſe limits, but was left ſo vague as ſome gentlemen ſuppoſe it to be, the nature of man is ſuch, that it would give the explanation of it to any triumphant party, of any deſcription, to the ſubverſion of every national right, and to the deſtruction of every principle of liberty. This, Sir, is not a mere introduction, but relates to ſome of thoſe arguments which I ſhall now uſe by way of explanation of the judgment in which the preſiding Judge of this Court bore ſo conſpicuous and able a part in the tribunal. I conſider that I ought not to ſwerve from my duty of counſel, when it is conſidered, that the law of *treaſon* was left unfixed by that high tribunal, and now remains ſo. I have ſaid there can be no treaſon without the employment of force. This poſition was anticipated the other day by a gentleman on the other ſide, whoſe argument was, that he had the judgment of the Supreme Court, in the caſe of Bollman and Swartwout to ſupport a different poſition. Sir, I certainly ſhould yield to, and acknowledge the weight of that deciſion, which, in my opinion, is the palladium of our ſafety—and I ſhould do ſo with the more willingneſs, becauſe I know that that honourable body is compoſed of men who are ever ſtudious to avoid error, and more averſe to repeat it, but ſtill more willing to retract it. But, I muſt be indulged to make one remark, (which perhaps may ſeem too ſtrong, but which I know will be pardoned,) that I have been deceived for more than 20 years with reſpect to him who delivered that opinion, if he would aſſert any thing that ſhould even place a ſtain upon the ſword of Juſtice; or put ſuch a conſtruction upon the law of treaſon, (which it ought not to bear), as is ſaid to be found in that paper.

But, why do I ſay that this cannot be the language and ſentiment of the Supreme Court? I ſay ſo, Sir, becauſe the point

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was not discussed, and because it was not necessary to be discussed; and therefore it was extra-judicial. What were Bollman and Swartwout charged with?—treason. But the moment that it was ascertained that there was no evidence in existence to convict them of actually levying war by force, or otherwise, no longer was any attention paid to that subject. It answered the purpose respecting them, but as the subject was not before them any farther, whatever opinion they may have given was extra-judicial: for every thing that is not strictly before the Court, cannot be considered as good authority.

But if it had been decided as was contended for, must we adhere to it at this time, if it shall now be made to appear that it was wrong? Uniformity, to be sure, is considered necessary in civil matters (and, to be sure it is desirable in all cases) and, with some few exceptions of errors, it is commonly used: but when we come to criminal cases of magnitude, no judge of reputation will hazard a sentiment upon the mere ground of his having once given it, but will examine into its correctness. If there be any such principle to be found, or such an opinion delivered from the mouth of any magistrate, it must have been at some period or other, or in such a way that will not bear repeating at this time; and in such a case as the present, without an immolation of every principle of justice and humanity. You do no harm to society by persisting in an error respecting property, though it is somewhat inconvenient and injurious to an individual: but what restitution can be made to the manes of a man who shall be sacrificed under such an error! What can you say to the family of one, who shall be thus unjustly snatched away! Can the former opinion of a Court pacify them, or reconcile them to the loss? Here is no appeal; but, in civil matters, retribution might be had: the judgment of every subordinate tribunal might be re-examined, and justice be procured.

I really believe, Sir, that if the doctrine contended for, on such decisions, should extend itself, one wave of injustice will succeed another, until our land will be unfit for the habitation of human liberty. I am well aware, Sir, that, you are now in a subordinate tribunal: and I am aware that there is an intimate relation between you and the Supreme Court. Necessity and public utility require that this connection shall be preserved—but what species of subordination, or relation can permit any thing that looks like *sanguinary?* Touch my right of property:—Property, go, if you please, floating upon the waves of error: but my *Life*—ah! it shall not! There must be more attention paid to that: and I will not believe that there is *one* subordinate Court in the United States, if it were once impressed that the opinion of the Supreme Court had been passed upon such a principle, that would ever pass a sentence upon any one who should be so unhappy as to come before it. Will you not be instrumen-

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tal, Sir, in rescuing one from the effects of a doctrine so dangerous; and where your own conscience must plead his cause! What, Sir; what dare you not to do, if you should think that our construction of this principle is wrong? I know not—I cannot—I dare not prescribe. But, one thing I know; and that is, what the *people* ought to do—they ought, most fervently, to pray to heaven to stay the arm of the destroying angel: or horrid will be the effects.

Again, Sir. Elementary principles, drawn from one case, so as to influence another, depends upon the similitude of those two cases in point of fact. Now, will, or can, any man pretend to draw the similitude between this case and that of Bollman and Swartwout? I presume not.

Further. It is indispensible, that *general expressions* in that, or any other opinion, should be taken with reference to the principal facts or question then under consideration: but this cannot be so, because it was contended in Bollman and Swartwout's case, that there was no military force used; nor any assemblage of men to effect the object charged. It was therefore unnecessary to enquire, whether military force was a requisite to constitute treason. The Court, therefore, finding no probable cause, in this case, to prove that the facts had been committed, (for it was impossible to conceive so), extended, it is said, their position beyond the degree commensurate with the case. They had no assistance from the Bar; they had no authority from precedent among themselves; nor had they to take up the decisions of any inferior Court; and therefore, in that particular, there could be no difference between the Supreme Court and an inferior one, except in this—that they moved in a more elevated part of the atmosphere, and that precedent emanated from our highest judicial body; but, Sir, justice says that precedents shall find their way into our Courts with less refraction.

But with regard to that opinion, which is seized upon with such amazing avidity by the counsel on the other side, I must say that it is inconsistent with itself. [Mr. K. read sect. 9. 10. 11. 12. of the opinion compared with sect. 6.] Now, how can any opinion which declares that no force is necessary to constitute the crime, be reconcled with these opinions referred to of Patterson, Iredell and Chase. The language is plain, and cannot be mistaken. I am not acquainted with the transaction relative to this opinion, but I have been told, that Judge Chase was probably present when this decree was entered into, and that he must have admitted of this sentiment. Now, Sir, I think the contrary, I believe that he never would have assented, if he had not believed that the whole tenor of the opinion accorded with what he had before said: he could not have mistaken his own words, or the language that he had put into the mouths of Patterson and Iredell. In fine, he never would have given a plain contradiction to himself.

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In delivering a legal opinion, Sir, you enter into a regular disquisition of the principles upon which you are to decide: and, therefore, it cannot be misunderstood. But that was not the case here. Now, Sir, suppose this opinion had been published to the world before any act of this kind had been committed: here is a little expression used, upon which the counsel for the U. States so ardently relies to support the indictment; but this preliminary obsolete sentence is opposed by the united opinions of the Judges who have, at different times, spoken on the subject, and the whole body of the paper is opposed to the principle it contains.—Now, could there be any thing more wrong, or unjust, than to think of punishing any man for an act, when it fairly may consider, that the judgment of the Supreme Court did not allow that act to be a crime? No arguments could vindicate a conviction under such principles. We want not to be subject to crimes which we never thought of, and not to be sacrificed upon a little particle in a paper, when the whole remainder of it justifies us. There is too much horror in the consequences of this, for me to believe for a moment that your honours will sanction it.

I have stated, that Patterson and Iredell contemplated the actual employment of force. Give me leave, Sir, to look at Patterson in the cases that may be employed against us. 2 Dallas, 346. The learned Judge uses very extensive reasoning indeed, which would have been totally unnecessary, if the intention had been sufficient to make the crime: he was under the necessity of going into a minute enquiry, to discover the acts of Treason, because acts of violence had been proved.

Here Mr. Randolph quoted and remarked upon the circumstances of Vigol and Mitchel's cases in 2 Dall. 346, and 355, where reference was made to Foster, 218. 2 Salkeld, and 5 St. Tr. in Vaughan's case, which was what Foster relied upon.—He said he was not acquainted with the history of the transactions of the rebels on Braddock's field, but he believed it was at that place that acts of violence were committed.

But, whatever might have been the principle maintained in Vaughan's case, it cannot be applicable to this; because there were two counts in that indictment, one for levying war, and one for adhering to the king's enemies: and because the English doctrine of constructive Treason is adverse to the Constitution of the United States. For, Sir, though part of the English words are used, yet we cannot admit of the English constructions; but hold them to be, many of them the mere *dicta* of Judges at a particular time or circumstance, and most of them arising from, and confined to, but more confounded with, Treasons of compassing the King's death: and it was this that gave a complexion to the judges, which, otherwise they would not have had.

"Treason," says our Constitution, "shall consist only in levying war, &c." Now, I will not enter into any verbal criti-

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tisms : but I think, if we examine the words with any attention, it could not be traced to any meaning at all, until we come to this : that to levy war, is to make war, or to consummate war. I do not pretend to say that the full and compleat object must necessarily be obtained, but that there must be an employment of force, is natural to conceive. But, Sir, let us look at the principle in another light. It is admitted that a conspiracy to levy war would not be Treason ; that an enlistment of men is not Treason ; that a marching of men to a partial place of rendezvous is not Treason. In these descriptions we have every thing but the assemblage. Now, what is an assemblage ? There may be a farther step still, and yet be short of the purpose. How are we to distinguish where an *enlistment* ends, and where an *assemblage* begins ? Will two men make an assemblage ; or what rule is to be established to discriminate at what, or what number a meeting may be so designated ?

This is a nice shade indeed to know an offence by ; and it proves clearly that there is nothing but the employment of force, by open acts, ought to be designated an overt act of Treason in this country.

Constructive Treason, we all know, is bad—it is acknowledged every where to be bad. But, says Mr. Hay, this cannot be constructive Treason. Sir, what we mean by constructive Treason, is Treason formed by analogy. What I call treason by construction, or analogy, is treason that is subjected to the explanation of a Court, or indefinite. But, Sir, it is worse than analogy that I am speaking about : it is Legislation ! And why ? Because it is striking out words which the definition of the case actually involves—it is the striking out of the words "actual force," and the *tearing* from our Constitution and Laws, every thing that conforms to our system of government.

There was a remark and question, however, which deserve considerable attention. It was asked what we should do, should an army be raised and ready to strike a blow, and yet, by some means or other there should no battle ensue, or a blow struck, or shot fired ; would not these men be traitors ? Give me leave to say, that the gentleman, in this remark, seems to regard a sovereign, with regard to his citizens or subjects, in the same light as a sovereign with respect to a foreign power. For a foreign power, if he has the appearance only of hostility—if there is only the rumor, or incipiency of an attack, might be supposed to meditate an attack, and thereby, perhaps, might be warranted to make war. But, Sir, is this the case in crimes supposed to have been committed by your citizens ? Are they to be treated as one sovereign would treat another, when they have the appearance, and mere appearance of hostility ? No, Sir, you are to take your degrees there, and to apply the act to the Law.

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Inliſtment! That is no Treaſon. But that even, however material, it cannot be proven. Tranſplant your diplomatic war, and make it the caſe of your citizens. But no Sir, the rule in all caſes is that you muſt mark the degree of offence and the puniſhment particularly attached to it: but you never can, for the ſake of puniſhing or preventing the commiſſion of leſſer offences, inflict the penalty preſcribed for greater crimes. We have ſeen the days when a doctrine of this kind was generally diſliked. I have marked the progreſs and effects of the ſedition law, from its beginning to its end, and I have found this to be one of the evils that attended it—that ſedition and libel, are the germs of rebellion. Now, what if Congreſs had attempted to ſay, that he who had commenced an act which might be termed ſedition, ſhould be guilty of the crime to which it might lead, (rebellion) what would have been the effect? I wonder if the popular reprobation would not have been conveyed in a tone of more force than ordinary thunder! If, becauſe there may be danger from not being able to arreſt it at the point at which it is about to commence, or in progreſs to completion, you are to add all the judicial weight you can to it; and to act upon it as if compleated, the conſequence will be, that you muſt take from your ſight the ſtage of the offence, and conſider the commencement as tho' it were at maturity! That is the effect of Mr. Hay's doctrine: and there is no way of preventing crimes in any other way, but at the awful expence of blood. Then go at once, Sir, to the root of the tree, and cut off every ſcion: deſtroy them, and every thing that might poſſibly engender error; and leave there no poſſibility of its maturation! This, Sir, is one of the beſt methods which I could think of ſelecting to ſhew the impropriety and danger attending the introduction, or indulgence, of *conſtruction*, in expreſs words of law.

I do declare, that I think the doctrine of the ſupreme Court, as underſtood and explained by the attorney for the United States, is as contrary to the deciſions of every Court, with which I have been acquainted, as it is poſſible it can be. But, it is more: it is contrary to the doctrine of treaſon in England, ſevere as they are, and unſuſtained as they have been by principles of right, juſtice and humanity. I will aver, Sir, that in England we do not ſee principles like theſe ſuppotted. There is no caſe, I will undertake to ſay, in *all* the Engliſh books, reſting entirely upon the queſtion of levying war, but where actual force has been employed. See Foſter 211. 12. Benſtead's caſe and Damaree and Purchaſe's caſe in 214. 15 A. D. 1710. Sir John Oldcaſtle's caſe 1 Hall 144. All theſe caſes prove the actual uſe of force to execute their treaſonable deſigns: ſuch as attacking the Archbiſhop's palace, demoliſhing meeting houſes; attacking the King's troops &c. And this doctrine is

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even supported by the inexorable Coke, who has confirmed all that I have said.

4 Blackstone 146, describes a riot, which, as to force, or action, is the same as levying war. Now, if we are to draw any logical reasoning from this description, can there be such a thing within the bounds of possibility, as a rising, or insurrection, unless there be *actual force* to attend it? If a rising and insurrection, in a case of riot, implies *force*, the same idea must be carried to the law of treason. Keyling 72. 79. gives a full idea of every thing that I have contended for on this head; and concludes, that, without *force*, there is no treason. This is a case upon a special verdict. 1 Hale 146 says, that if the King's castle be obtained, and not by force, it is no treason.

Ch. Justice. That case is denied.

Mr. Randolph. If, Sir, the case is denied any where, it brings into my remarks, a question, of what you would do with a man who should have been misled? By that book, it will be seen, that force is necessary; and that no man is to be sacrificed, who has not used force, even if it be the holding of the King's castle. Foster 219 confirms all the doctrines that I have now advanced, and depend upon. And, Sir, looking into Hale, Foster, Hawkins, Keyling, Coke and Blackstone—and, indeed all the law writers of England, it will be found that in levying war, no single indictment was ever laid, nor an act considered to be a treason, of that species, without the actual employment of force.

Treason, Sir, is distinguishable by three distinct ideas in relation to the English law—intention—assemblage—use of force: and these three divisions relate to all the charges of treason which have ever been produced. Now, is it possible to suppose that the mere assemblage of men, who have no more evil intention than the earth on which they tread, are guilty of treason? Is it to be supposed that the legislature would suppose them capable of it, (when they made an act upon the subject), unless they broke out in open hostility? No Sir: between that, and the accomplishment of the purpose, there is a great interval. Shall it forever be maintained, as an indubitable principle, that because two out of three steps might have been offensive to the laws, that the third must be wrong inevitably?

Sir, I speak not now of Mr. Burr, but of the principals; because Mr. Burr is only an accessory. And shall we say that Mr. Blannerhasset, Tyler and Smith, the three men who *were* present, could form an assemblage; or that they would inevitably have gone on to the accomplishment of the purpose which has been charged? They might have determined to recede from their purpose, whatever it was; and the rule of law tells us, that whenever there is an opportunity to recede from a purposed object, it is to be presumed as accepted by the man, unless the

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contrary be shewn. If there be a *point* of the offence necessary, at which an object shall be compleated, it is not necessary that, because one or two of the lower degrees are gone into, the higher degree must, inevitably, be attained. Now, Mr. Hay said that it was not necessary to prove the article of force, but that the raising of numbers sufficient to compleat the mischief charged, would produce a conviction. Sir, that maxim does not apply here: they cannot convict Mr. Blannerhassett himself upon this principle. There must be a military array; and a military exertion, even to convict him. I will now close this point, with a single remark, that I do most heartily congratulate your honours, upon having this opportunity of fixing the important law of treason. It rests with *you*; and *to you*, on the day on which the sentence shall be pronounced, will the eye of anxiety look. It is an important question.

Secondly. Mr. Burr cannot become a principal in treason, even if he were concerned as an accessory in the acts charged. Does the constitution, Sir, admit that accessories in treason are principals? There is not a single syllable in it to that effect. The language of the constitution, defining treason, is couched in very few words—"in levying war" that is, any person "levying war against the United States" shall be guilty of treason. Can this, in common parlance, be considered as applicable to a person who writes a letter? If it were to be asked what you meant by a person writing a letter, would you mean the real penman, or the amanuensis? Surely, the person who indicted the letter: the constitution would not recognize the introduction of any other person: nor will the law, in criminal cases, ever tolerate for a moment, a doctrine to involve an accessory in the principal guilt. Why are strict rules laid down upon this subject; and Judges tied to the letter of the law, if it is not to prevent them from putting constructions contrary to the strict words and meaning of the law and constitution. Sir, no fancy, no imagination, no conjecture, no faction, can prevail, when the words of the constitution are plain and certain. But, fix the law as it is to prevail, contrary to your constitution, and upon that, come to pronounce the dreadful sentence—once establish that principle; and I defy, words to determine to what extent of evil it will go. Prosecutions must go on supported by faction, imagination, politicks, likeness—if all these are not to be introduced, where can you find accessories?—In the common law of the land! [Refer to 2 Dallas 384.]

Mr. Hay. Accept of our concession!

Mr. Randolph. I knew very well that you could not sustain it, but I wished to give my ideas their full force. The essence of the idea is, that there is no common law that will support an indictment for offences against the United States, at the federal Court.—The whole could not be supported by the

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common law, but a part, it ſeems, can be. Treaſon could not be ſupported at common law, but a half of treaſon can. Treaſon in the perpetrator cannot be ſupported at common law, but treaſon in one who is connected with the perpetrator can be convicted! Now, really, Sir, this is ſtrange logic to me—you cannot ſuſtain an indictment at common law againſt a principal in treaſon, becauſe the conſtitution defines what treaſon ſhall be, and who are guilty of it; but you may ſuſtain one againſt, or ſubſtitute, a perſon who is not known in the conſtitution! The maxim of the gentleman the other day was—lay aſide common law: go to common ſenſe. Is this the poſition now? Are you to create crimes, and introduce perſons into offences by the rules of common ſenſe? Is this the right ſtandard? No, Sir, it is in law: give to me that, becauſe I know how to ſhape my conduct by it; but leave it upon the principles of common ſenſe, the Lord have mercy upon the people of America!

Mr. Hay. We do not argue for a conſtruction upon the conſtitution.

Mr. Randolph. But, Sir, if conſtruction on the Conſtitution is not argued for, the principle maintained by the doctrine muſt lead us to believe that common ſenſe is common evil: for I do not know what elſe it can amount to, ſince it brings in new perſons, unknown in the conſtitution—acceſſories to crimes, of which they know nothing; and new perſons to take part in old crimes. Sir, give me day light, and let me depend upon facts which are eſtabliſhed: but do not carry me into darkneſs, and then condemn me, becauſe I ſtumble! I cannot help it.

I do moſt ſincerely hope, that I have miſapprehended another conſtruction, which reſpected national policy. A criminal adjudication to hang upon *national policy!* Common ſenſe was vague enough; and dangerous enough to reſt upon: but national policy is ſtill worſe. Burn all our code of laws, Sir, and leave us to hang upon our fate—national policy! when will be the time that the people ſhall be awake? It is time for them to ariſe and watch their liberties.

But, are the acceſſories in crime to eſcape altogether? I will not undertake to ſay whether they are to be indictable for leſs offences than treaſon, or not: that is not my preſent buſineſs: all that I contend for is, that they are not in *treaſon*. It is enough for our purpoſe, that they cannot be guilty of treaſon, in law: and whether there be leſs penalties or not reſpecting them, we have nothing now to ſay. The conſtitution appears to me to contain two forms of language: one is merely to mark out the outlines within which legiſlative power may or ſhall reſtrain itſelf in common crime. The other relates entirely to treaſon, and fixes limits, beyond which the Legiſlature itſelf ſhall by no means go. Sir, if I may preſume to compare theſe words with ſacred writ, I would appropriate the words of the

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ſacred ſcripture to it, that "heaven and earth may paſs away, but not one jot or tittle of theſe words ſhall paſs away." Legiſlative proceedings ſhall *all* be ſwept away, but *this* ſhall not be touched, leſt it be polluted. If then, not a tittle ſhall be taken from the doctrine of treaſon, why are we to travel into the fields of *fancy* to gain nothing?

There is, it is true, an opinion of ſome Judges which ſays, that in treaſon all are to be conſidered as principals! But what are we to ſay to this doctrine? are we to bow down to it, like to the image which Nebuchadnezzar ſat up, made up of heterogeneous materials as it is, or be caſt, like, the diſobedient of that day, into the flames? No, Sir: we will critically examine the ſyſtem itſelf: we will trace its traits, to ſee whether the ground which theſe Judges have taken, is not ſubſtantially erroneous. I am not going to the code, but I will, in a few words, ſay that the main idea has been taken from a miſconception of one caſe; and it has gone from book to book until it has come down to us. Sir, go to Tucker's Blackſtone, a book that of itſelf is ſufficient to immortalize the author, and there ſee what this doctrine is, and where it came from. It came from the *year* books. I declare that the caſe is not warranted as ſtated in the Engliſh books; and that the principle is fundamentally wrong. Did not Lord Hale take it up? Yes, he did; but of all the few imperfect things which that good man did in his life, his treatiſe on criminal law, requires reviſion. Lord Coke. He is a lawyer without a heart, without feelings or prudence. Foſter. He is dragged into it by precedents! But let *us* not be ſo. Do we adopt the Engliſh acceptation and doctrines, becauſe in our Conſtitution we uſe the word "treaſon!" Sir, we ſometimes uſe the word "felony" when we talk of robbing a man, but does that let in all the properties of the common law of England reſpecting felonies? You adopt it *pro ad verſi*, and that is all. The ſame with regard to treaſon: you cannot adopt it in any other way than the Conſtitution has handed it down. Can it be ſuppoſed, that our Judicious convention intended to adopt it with all, or with any of the common law terrors? What, Sir, is treaſon at common law, in its ſimple acceptation? An invaſion of the royal prerogative. Now ſuppoſe it were to be ſaid, that all the horrors that treaſon is clothed with in England, are to befal the citizens of this country; would the objections to it ever ceaſe? They poſſibly could not. But analogy in treaſon is forbidden. Treaſon, with reſpect to a Prince, cannot be even rendered homogeneous with treaſon againſt the United States. The Conſtitution intended to take theſe words according to the American meaning, and they were ſo rendered in the law. But even if you give the Engliſh law fair play, I am not in the leaſt afraid to truſt it, according to the acceſſorial guilt which ariſes from compaſſing the King's death. See 4 Bl. 36.

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" But this will not hold good in the inferior ſpecies of high treaſon, which do not amount to the legal idea of compaſſing the death of the king, queen or prince. For in thoſe, no advice to commit them, unleſs the thing be actually performed, will make a man a principal traitor." Foſter 342. And, Sir, can this Court extend the doctrine beyond that? Can you indulge antipathies, when the Conſtitution ſays "*levying war only*" can be called treaſon? The Engliſh Judges indulged thoſe antipathies to extend to the acceſſorial doctrine of treaſon. But would you extend this doctrine to the United States ſo as to place acceſſories in the ſame ſituation as principals, when, in moderate times, it was not permitted there! A little common ſenſe and a little national policy might poſſibly be mixed to procure this deduction, but I can hardly think it would do. Sir, the true reaſon why the Engliſh doctrine was extended ſo far, was to guard the life of the King, as all the books will ſhew: and to that, every principle was yielded with idolatry. Levying war was generally coupled with the death of the King, or attempting the life of the King—it was treated as *an overt act*, though no *act* was committed. And I defy the moſt accurate researcher, who has gone through the caſes of treaſon, and who can reaſon the moſt acute on the ſubject, to ſay that 999 caſes out of 1000 in treaſon were not connected with a compaſſing of the King's death. It is from that evil ſource that all the evils of which we read on this ſubject have ſprung. When they do not ſpring from that, we can only trace them to the caprices of the Judges themſelves. But, Sir, our American Judges do not want to tranſplant ſuch dangerous doctries too haſtily into our code. They wiſh not to contaminate our Courts with doctrines affecting royal majeſty only, but to give the ſafety to every citizen which our Conſtitution provides him.

But, are acceſſories to go without puniſhment? Here again we are brought to the ground of expediency, national policy, and the like. I will not ſay more than I have ſaid upon this ſubject—that if they do go unpuniſhed, it is not a fault of your commiſſion; but that if you undertake to puniſh them, you legiſlate, inſtead of judge. I recollect, that a motion was made once, to introduce the Judges into the council of reviſion: but no; it was ſaid, the Judges were not proper, becauſe it was an intermixture of the departments of our government. They have their tribunal, to that they are *diſtinctly* appointed; and to no other function under the laws: otherwiſe, they may become tyrannical at ſome period or other.

Mr. Wickham has anticipated me in one remark, which I meant to have made, as to the act of Congreſs vol. 1. p. 100 relating to acceſſories being named in ſome crimes, and omitted in others. The reaſon there for is clear, that, as they are not named in treaſon, there are no acceſſories in treaſon. This is

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concluſive. Here again we are afloat I ſuppoſe; we are ſtanding upon ground which totters under us! Who knows what were the ſentiments of thoſe who made that law? Upon this ground, Sir, no man, or body, ought to be believed. We appeal to the words, and that is the only way to underſtand the impreſſions of thoſe who act.

I now come, may it pleaſe your honours, to ſpeak with reſpect to the indictment. In whatſoever manner an acceſſory is to be conſidered—even if as a principal, yet the *modes* in which he is to become ſo, ought to be ſpecified in the indictment. It is not enough to ſay in the indictment that he is a principal—tell us how? It is not enough to ſay that the law makes him ſo—tell us the facts? Of what avail, Sir, is it for us to demand a ſpecification of the overt acts, if it be not to defend ourſelves? 4 Bl. 39. "that the accuſed may know how to defend himſelf, when indicted." Againſt what are we to defend ourſelves? Againſt facts. But we want to know what thoſe facts are, and who it is upbraids us with doing wrong. Of what avail would it be for a man to know that a certain law, by name, exiſted, except he could have a knowledge of the conditions of it? This could be the only criterion for him to judge of his actions by. Now, with reſpect to a crime, there may be the crime of treaſon committed by ſome perſon or other, at three different places, and he may be charged with being an acceſſory in treaſon with perſons in treaſon. The declaration ſtates, that he is guilty of treaſon: but it might not ſtate the date, the county nor the place, perhaps. And even in the 360 acres of Blannerhaſſet's iſland, one man may commit treaſon at one end, and another at another, and a third in the middle. Now, the doctrine of the gentleman would juſtify the principle that the ſame indictment would do for all the purpoſes; and the perſon charged muſt ſhape his defence as well as he can: he may ſit and conjecture for which he is charged; he may want information, but of whom is he to obtain it? Is he to write to the Preſident, or any other federal miniſter of juſtice? They would be ſilent; and he is left ſtill in vain to gueſs. But he muſt prepare to anſwer. He is to come to this place to be tried, which is ſeveral hundreds of miles from where the charge ſpecifies? He muſt prepare himſelf to anſwer what he *moſt probably* will be charged with, if he can even find out that. In this ſtate of incertitude, he aſks a poſtponement, but in vain! There is no excuſe—the trial muſt go on! Do you mean, Sir, to expoſe us to theſe ſerious conſequences, which might be fatal to any innocent man? Do you mean to do more in this caſe than was ever done or heard of in this country, or even in England? No, Sir, you do not: you will not do it. There may be *dictas* ſomewhere or other though, but I know of none: if there be any, I will venture to ſay it cannot be admitted as authority here. I will ſhew

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you precedents to the contrary, againſt which no *dicta* can ſtand. 1 St. Tr. 130. Balliot's caſe, in which caſe adviſers and aiders are moſt minutely deſcribed, A. D. 1586. ſame book 163 Earl Arundel's caſe A. D. 1589. ibid. p. 187. A. D. 1592. Perrot's caſe. Theſe were at different periods; and when the Britiſh horizon was in a darkened ſtate. I will undertake to ſay that all the books on the ſubject of acceſſories in Treaſon ſpecify the neceſſity of the *manner* in which a perſon is to be ſo charged, being inſerted in the indictment. Sir: I will aſk this ſhort queſtion—whether the Court *then* and *there* is to be more mild than the Court *now* and *here?* Whether the Courts of the tyrannical reign of Henry the 8th when and where royal prerogative was worſhipped, ſhall be milder than, in this enlightened age, they are in this free and enlightened country.

Poſitive precedent—all the analogy, and all the books are on our ſide. Look, Sir, at Petit Treaſon, where a perſon is ſtimulated to the act by another; you will find, that the form of Indictment begins with the principal in the firſt inſtance; and the act itſelf in the ſecond. In murder—ſuppoſe two perſons are jointly charged: one of them gives the ſtroke, but the other is conſidered only as preſent, aiding and abetting. Being preſent, he is a principal in the ſecond degree. Here are two principals—how is the indictment to be drawn? Why, he who is a principal in the 2d degree is charged as having made an aſſault, and the other as having given the blow. Now, why could not the drawer of ſuch an indictment charge them both as actually engaged in the commiſſion of the murder? Sir, let an indictment be ſo drawn and it muſt be withdrawn, or it will be quaſhed. There are two modes of drawing an indictment in ſuch a caſe—one is, to include all the parties, naming them, and ſpecifying the part each of them took in the offence. The ſecond is, as above ſtated. See Foſter, 336, on the ſtatute of ſtriking. But with reſpect to a murder occaſioned by a *thruſt*, he who made the thruſt only, ſays Foſter, ſhould be deprived of the benefit of clergy: and the reaſon given is, becauſe it was a ſevere law. What are we to ſay then of treaſon? It muſt apply to all laws inflicting a capital puniſhment, that there are ſecondary degrees in crimes. Mr. Wickham has commented very ably on this part of ſubordinate agency and acceſſorial crime.

But, Sir, what does this indictment farther intend? It deprives us of a Jury of the *viſcinage*. Now, if the action be adviſed in Richmond, and perpetrated in Wood county, where ought the perſon to have his Jury from? From the place where he perpetrated the offence. Now, inſtead of having the Jury from Wood county, where the offence was perpetrated, you have the Jury from Richmond, however inflamed in their minds at the tranſaction, and no matter by what arts or means!

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But there is another objection to the manner in which this indictment was laid, and that is of material consequence. *The principal must first be convicted, before the accessories can be brought to trial:* unless he shall wave it by his own act. This evinces the difficulty into which we are brought under an indictment like this, whatever predicament it might bring the prosecutor into. What is the doctrine of the gentleman, if it should be attempted to be sustained? Why, by laying the offence in Wood county, you make it impossible for the defendant to obtain the advantages which he ought to obtain from this rule of law requiring the principal to be tried first. Indeed, according to experience I have had in criminal cases, and the researches I have made into all the authorities on the point, I think that there is nothing more clear in practice. It is then, if this be correct, a sound principle that this indictment is radically wrong, and that any attempt to apply it to this case, must prove insufficient to its support.

Say, therefore, that the indictment is a perfect one in every other respect, as can be drawn, there can be no conviction of the accused, until the real principal is convicted. I do not repeat the cases adduced by Mr. Wickham; I shall satisfy myself with his remarks on that subject. I do not believe that our government is capable of any thing like oppression, or false accusation, knowingly. But we are to consider, whenever we say any thing about government, and individual crimes, that there might be a time when persons more corrupt than those who now wield the sword of state, whom we may not have to fear, may rule so as to make us feel. Should such a time come, if this doctrine be not established; the government may pass by the principal, and the accessory might, at least, lose one, (and an important one) of his chances to escape. If the accessory, Sir, can be convicted without the proof of the conviction of the principal, then, when the principal is dead, the accessary may be brought to trial, and convicted. Sir, will you put in the power of the government, or any man belonging to it, thus to trample upon your citizens! I may say, "there stands the man who is the important object of my hatred—The principal perhaps may be tottering on the very mouth of the grave! A few months, weeks, or days, and then I will give full vent to my utmost enmity. He is gone! Thus can any obnoxious character be got rid of"—but this can only apply to periods of base corruption.

But, Sir, what you do now will be brought up as precedents to future ages. I have seen in history, Sir, that precedents, even of the conduct of tyrants, or those who ruled under them, have frequently been brought up under good princes. In England, if the principal stands, would the accessory be convicted! Would you believe that in England they would permit an accessory to be carried to trial where even the madness of a principal can be brought by way of excuse? I have often had occasion to refer,

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and with some degree of obloquy, to Lord Coke: he, however, might be quoted safely on this point. But there is one, who was attorney general in the reign of James, whose name deserved immortality, and may be safely quoted, who, in one of his letters to the king says "when I can state the matter obscurely to the able judge, the purpose will be answered!" Then, Sir, if any man should come forward with such a state power over our judiciary, is it impossible that the time may yet come that he might succeed!

Then, Sir, guard you against this at a future day. I am proud to say "at a future day," because there has not been the least thing of the kind in America yet: God only knows how soon it may come. I cannot distinguish the Treasons of accessories after the fact, from those before the fact, when I take into view, that a Traitor is one *in* the fact. The distinction of this doctrine, however, is not material, because in common law, with which we have not to do, all are principals. Nothing will do to convict an accessory, except the record of the conviction of the principal shall be produced: and the reason as to accessories, after or before the fact, applies the same in both. If there be any distinction, it is, because the law will not believe that accessories before the fact will ever be considered as principals. It is left at large to conjecture how much more fatal it might be to take charge of such an offence.

I shall say nothing on the subject of our having come to trial—it could not be avoided: we did not know what we were to be charged with; and were willing to hazard the scrape and difficulty into which we are evidently thrown; and to answer in the imperfect manner that we are forced to. We wanted to know what the indictment would be; and in that we have been gratified. Now, Sir, tell us what the law is—whether we are to look to *caprice*, to *human rights*, to *national policy*, or to *conjecture*—let us know what *is* to happen to us, or what is to fall from heaven to destroy us! All that we can then do, is to fold our hands and submit with as much acquiescence as we can to the divine vengeance! That *must* be the case, if our doctrine is not sustained.

Mr. Hay. If the proposition of the gentlemen are true, there is an end to the cause. It is evident, Sir, from the course of their arguments, that they have been the subject of much labour and attention. Ignorant as I am, and incapable as I might appear to be, by those gentlemen, I must yet be indulged to *presume*, at least, that it will be in my power, if I should have the indulgence of time to run my eyes through the notes which I have taken, and to consider the arguments, for me to weaken the force of theirs.

It is still more laborious to run through the numerous authorities which have been quoted. It will be impossible for us to do it this day. I understood yesterday that it was the intention of the Court to allow us some time, proportioned to the magnitude of

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the ſubject. I do not believe it will be poſſible for us to proceed to anſwer to-morrow. If time ſhall be allowed us, I think that this caſe, which has been made to cover ſuch an immenſe ſpace of legal territory, might be brought into a very narrow compaſs, and be ſoon concluded. I hope therefore that the Court will indulge us until Monday to proceed.

Mr. WICKHAM. It is certainly a new propoſition, that in the midole of a Jury trial, the caſe ſhould be poſtponed: and that, after the Jury have been impriſoned for nearly a week. There never has been ſuch a propoſition made in a Jury trial before.—What, Sir, are our arguments? Are they legal, or are they not? They ought to underſtand their own caſe. They ſay, however, that they do not underſtand our grounds. The gentleman's reaſon for his propoſition is, what?—That our arguments have no force in them, and yet they want to adjourn till Monday to find out the ground! The ſame reaſon which induced us to make this propoſition to the Court, will induce us to oppoſe the leaſt delay—that we want to obtain a termination of this caſe as ſoon as poſſible.

Sir, it is cruelty to the Jury, to keep them confined. I preſume that the gentlemen do know and have well conſidered, the law on the ſubject; and that they will be able to anſwer to every argument applied to the caſe. If they are not thus prepared, it muſt be their own fault. If we ſucceed, the Jury will not be kept for any conſiderable time: if we fail, there is no knowing when the cauſe will end.

Mr. MARTIN, did not wiſh to deprive the gentlemen of the convenience which they deſired.

Mr. WIRT. The gentlemen of the Jury, Sir, ought to be extremely obliged to the gentlemen on the other ſide for the great accommodation which they have propoſed to give them—more particularly, they ought to be ſenſible of their marked attention to them, in withholding the caſe from the Jury altogether; and putting it to the Court to decide! They muſt have a great confidence in, and complaiſance to the gentlemen of the Jury.

But it ſeems that we do not underſtand our caſe. They riſe to tell us ſo, and object to the Judgement of the Supreme Court of the Union: which we had thought, put the caſe altogether to ſleep. Could we have ſuppoſed that the gentlemen would one and all have riſen in arms againſt ſo high an authority! Here are ſix or eight gentlemen of great talents and experience in law knowledge, diſcuſſing, and reducing the argument, from their ſtudious attention to all its parts, to the laſt poſſible eſſence that they could—and we, incapable as we are, muſt be prepared, in one day to anſwer what has taken them two days to deliver; and, perhaps, what has been one month in digeſting.

Then, Sir, after this unexpected exploſion: after having, from behind their ambuſh, ſprung upon us with all their force,

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we are to go on at a moment's warning! Sir, it has been juſtly ſaid that the fate of this proſecution depends upon generalſhip. If this be one of the acts of that generalſhip, it merits all our attention. This irregular withholding the caſe from the Jury is a queſtion of the greateſt importance to this country; and the country are looking up with the greateſt anxiety for the reſult. Are we to go on under theſe circumſtances, without their giving any time at all to us to ſhoulder or to preſent our firelocks? Is this the kind of victory that juſtice and right require? Is this the kind of acquittal that the accuſed ought to require? Ought there not to be a diſpaſſionate examination of the caſe? You will remember, Sir, that there are three or four other caſes which are to be ſettled by the principle of this adjudication.

I beg your honors to recollect, that the gentlemen we have to encounter in argument are gentlemen of the greateſt celebrity, and who plume themſelves much upon their criminal knowledge, (I mean, their knowledge of criminal law) will not theſe gentlemen allow us an hour or two, merely for the purpoſe of preparing the waſtes of preceding days, and anſwering their poſitions with as much judgment as we do poſſeſs?

Mr. Hay. A gentleman has ſaid that we ought to be prepared. In addition to the obſervations which have been made, I would juſt obſerve, that the motions continually kept up; and the multiplicity of arrangements neceſſary to make, to meet the gentlemen's objections, have claimed all my time, ſo that I could not ſpend a moment to think what might probably be brought before the Court; obliged as we were, to meet every thing.

Mr. Martin. Do the gentlemen ſuppoſe they regret that they are not placed in that awful ſituation of deciding upon the *life* of a fellow creature? It is inſinuated, that we dare not truſt the caſe with the Jury. Sir, I dare truſt it with this Jury: I would truſt *my life*, were it my own caſe, with them.

The gentleman ſays, that we will not give him time to ſhoulder his firelock. I underſtand the gentleman is lately promoted in a military line: if he will engage to carry on as innocent a war as that on Blannerhaſſet's iſland was, we will allow him to ſhoulder his firelock, and even to point his guns at us, if he pleaſes.

Mr. Botts. In the caſe of Hardy, Mr. Erſkine, counſel for the priſoner, at eleven o'clock at night preſſed the Court very hard to have time to digeſt his notes—Here the Jury were to be impriſoned by it, and the other trials were to be poſtponed in conſequence, if it had been done. It was ſuppoſed by the Court that he ought to be prepared to go on with the caſe. How are we ſituated in this caſe? It is not certain that this particular queſtion, alluded to, went before the ſupreme Court; and it was the buſineſs of thoſe gentlemen to learn themſelves on that ſubject, and every thing relating to treaſon. If time is given in this inſtance for them to digeſt, will it not be reaſonable that we

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should have time to digeſt for our reply to them? I am ſorry that there ſhould be any effort made to divide the Court from their Jury; and I hope the Jury will not believe it to impair their rights in the leaſt that we have made this motion: while I wiſh to ſee a Jury uncontrouled, I wiſh not to be driven to the neceſſity of preventing evidence from going to them: but if improper evidence is offered, it ought not to detain the Court. I heard, on the other day, reference made to the people: I heard it inſinuated to the Court that if they did not give a particular opinion, the people of Virginia would tell them that they were wrong. Now, Sir, I have a more exalted opinion of the people of Virginia than they have. However, I will do the gentlemen the juſtice to expreſs my real belief, that they did not mean a popular appeal.

CHIEF JUSTICE. It is very obvious, that if the motion of the defendant ſucceeds, there will be an end to the trial; becauſe the attorney has declared that he has no other evidence, to prove the treaſon, upon the principle contended for by the defendant's counſel. It is contended, in ſupport of the motion, among other things, that the teſtimony which has been given, not only does not ſupport the charge, but that the charge cannot be ſupported.

Now, deſirous as the Court is to ſhorten this caſe, which, at beſt, will be very long; and though it would not wiſh any unneceſſary delays; yet, where an application of the preſent nature is made, as this is a queſtion to determine a principle of great importance, which muſt, in one event, determine the caſe: and which alſo goes to fix the law of treaſon with reſpect to the preſence of the party charged—when ſome parts of the motion relate to the indictment being inſufficient to ſupport the charge; and other things which were not foreſeen. It would be with great reluctance indeed that the Court would oppoſe the requeſt, however deſirous it might be to proceed, when there are ſo many reaſons to ſuppoſe that the gentlemen may not be ready to anſwer. The court certainly cannot force the argument to proceed at this time.

Mr. MARTIN. Upon the poſition that it is the right and duty of the Court in the preſent ſtate of the caſe to determine whether there has been any overt act perpetrated—and whether it is neceſſary, in the preſent ſtate of the caſe, to be proved by two witneſſes, I beg leave to ſubmit to the conſideration of the gentlemen in the proſecution, an authority or two. Cooper's reports. 102. 117. 12 Cooke 5. Rookward's caſe. 4 St. Tr. 661 and Lowick's caſe 4 St. Tr. 717.

Upon the ſubject of opinions which do not go to the immediate point that was in iſſue before the Court, as that of the Supreme Court, which is ſo much depended upon, I will refer to Vaughan's caſe. 382.

The Court was adjourned to Monday.

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MONDAY, August 24.

Mr. RANDOLPH. Before the gentleman addreſſes you on our argument, I beg leave to mention one remark which I omitted on Friday laſt, and which I will now leave for their conſideration. The 8th amendment to the Conſtitution of the United States reads thus "the accuſed ſhall. . . be informed of the nature and cauſe of his accuſation"——I do not know that it is neceſſary for me to animadvert upon this clauſe. The nature and cauſe of an accuſation neceſſarily involves in it all the particulars of the charge, ſo as to enable him to prepare for his defence in detail.

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Mr. M'RAE. May it pleaſe the Court. The avowed object of the motion made on behalf of the priſoner, is, to exclude all farther evidence from the Court and Jury. And at this ſtage of the proceedings, to put a period to the proſecution. I could have wiſhed moſt earneſtly, that the neceſſity were not thus early impoſed upon me, of declaring my conviction of the priſoner's guilt of the crime which is charged againſt him. It was my anxious deſire, to have poſtponed all remarks of that nature, till the whole evidence in ſupport of the proſecution, and in favor of the priſoner, ſhould have been heard by the jury; but I am no longer allowed to purſue the leſs offenſive courſe, which I greatly preferred. The counſel for Aaron Burr, have *themſelves* obliged me to take a *different* direction. They have made a motion, which from its very nature, neceſſarily involves the conſideration of the queſtion, whether the priſoner be a principal or not, in the treaſon for which he is indicted; and this queſtion, according to the beſt information I have received, I am now bound to diſcuſs. Why, permit me to aſk, Sir, is this motion now made? I do not make this enquiry as relates to the counſel for the priſoner. It is their *duty* to conſult their *client*, and to ſhape the defence agreeably to *his* inſtructions. His ſituation authoriſes *him* to preſcribe, and his talents *eminently* qualify *him* to ſelect the beſt poſſible route to an *eſcape* from the effects of this proſecution.

With a dexterity unexampled, he has from the commencement of theſe proceedings, almoſt invariably contrived to leave the ſtation of *one accuſed*, and to appear before the public as *an accuſer of others*.

The highly reſpectable citizen, who apprehended and conducted the priſoner, to the place deſignated by the conſtitution and law as proper for his trial, has been loaded with obloquy, for the meritorious ſervice he has rendered to his country.

A diſtinguiſhed officer of the United States, for detecting this treaſonable plot, and for oppoſing the execution of it, at the hazard of his fortune, his life and his *honor*, has been wantonly and cruelly denounced, *as if he were himſelf a traitor for having*

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opposed treason, and upon his arrival in this city in obedience to a subpœna requiring his attendance as a witness against the prisoner, an effort was made *by the prisoner*, to cast him into a dungeon, for an *alledged* offence, which was not proved, and for conduct, *which*, when examined appeared to be in the highest degree *praiseworthy*. The public functionaries, also, to whose vigilance, activity, wisdom and patriotism America is indebted, for the preservation of her peace, liberty, government and *union against a foul, rank, deep laid, extensive, and most formidable plot of treason*—without the effusion of blood, have been denounced, and a vain attempt has been made to stigmatize them, as the tyrants and oppressors of the people.

It required no extraordinary strength of discernment, to perceive the *object* which these measures contemplated. The developement of this plot, had deservedly excited universal indignation and abhorrence, and to *divert* the public odium from themselves, to *those* who had *saved their country*, was certainly a daring attempt; but perhaps the very best policy of *those* who were *concerned* in the treason. *Cataline the Roman traitor*, was of that opinion, and made the attempt; but as upon all such occasions ought to be the result, fortunately for his country, *he* failed. Remember I beseech you, Sir, the multiplied protestations of innocence, made for the prisoner, while all these obstacles were thrown in our way—while (previous to Gen. Wilkinsons arrival) it was yet hoped, that an indictment might not be preferred before the Grand Jury, against Aaron Burr, and while, *afterwards*, the result of the deliberations of that respectable body, remained uncertain: How often we were challenged, to produce our witnesses and go on with the prosecution: How frequently it was repeated, that the prisoner was *innocent* and was *persecuted*, and that he feared *no* proof which could be brought against him: How the gentleman from Maryland *solemnly* declared *his* belief, (I think his words were) "that *his* honorable friend, was as *ignorant* and *innocent* of any treasonable plot, as the child yet unborn;"—and as late as Thursday last, I understood the worthy gentleman who opened this debate, *solemnly* to declare it as his belief that *the prisoner was altogether ignorant of the overt act committed on Blannerhasset's island*—I will make as it is proper to do, every reasonable allowance, for the favorable impressions which the prisoner may make on the minds of his counsel—but, as relates to *himself*, *this* enquiry will *obtrude* itself upon every reflecting mind. If there be in reality *no* danger apprehended from the testimony on the part of the United States: If this boasted *innocence* and *ignorance* of any treasonable plot, *do* in reality exist —Why this *strenuous* effort to *exclude our evidence* from the Jury? Will such an *exclusion of the evidence*, serve to place the *honor* of the *accused*, on the high ground which *innocence* ought to occupy? —Many appeals have in the course of the debate been made to

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common sense, and I leave it to *common sense* to answer these enquiries. But, Sir, the Court have decided that the motion *might* be made. The counsel for the prisoner, have, in arguments delivered at very great length, and relying on a number of authorities, insisted that it *ought* to prevail: and maintaining as I do, a contrary opinion, it is my duty to give them a reply.

Mr. M'Rae observed, he was not a little astonished at the confidence of success expressed by the gentleman who had made the motion: but supposed that confidence proceeded from his feeling a sincere wish for the success of the motion, by dwelling on which he had at length convinced himself that it ought to prevail. But the authorities cited by him had not supported the points for which he contended.

The positions relied on by Mr. Wickham, were, first, that the accused not having been present at the commission of the overt act charged in the indictment, no evidence can be adduced to prove his connexion with that overt act; and secondly, that the overt act laid in the indictment, was not sufficiently proved to admit now any farther evidence: Upon which grounds Mr. Wickham said, that neither by the constitution or laws of the United States, the laws of England, nor *usage*, the prisoner could be convicted.

It will be sufficient to have recourse to the laws of England and the constitution of the United States upon this occasion; for *usage* has nothing to do with the question.

The definition of treason in the federal constitution, is in the following words: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Mr. M'Rae then proceeded to animadvert on the arguments of Mr. Wickham in the order in which they had been by that gentleman delivered. He observed, that Mr. Wickham had admitted that the words of the statute 25th Edw. 3, concerning *levying* war, are the same with those of our constitution, but says that the construction of the constitution ought to be different from that which in England has always been given to that statute. I think it of no consequence to the present enquiry, whether the United States as such have a common law or not, and whether the common law of England is to be resorted to or not. If the construction of a statute in the same words with the constitution of the United States is *reasonable*, the same construction ought to be applied to the constitution; otherwise not.

It is immaterial to me, whether we be referred to our statute, to our constitution, or to the law of England, since the words are the same; and are as plain as words can be made to express the object. But I think differently from the gentleman: I think that they probably comprehend such a case as this is.

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The question is, whether it can be possible for a man to be convicted for *levying war* against the United States, and yet be absent from the spot where the *overt act* was laid? That obliges me to speak about our evidence—that very evidence which they wish to exclude, as well as that which the court have heard. I hope, Sir, that the necessity imposed upon me to speak at this time, will be regarded by the court as sufficient apology for my mentioning the amount of the evidence which we would bring forward.

Cb. Justice. I understand the question is such, that the counsel for the prosecution has a right to suppose any evidence which they might produce; because the nature of the motion is, that no evidence can be read; and for reasons which they have offered. Therefore, any evidence may be mentioned, before the question is decided whether the Jury shall or shall not hear it.

Mr. Martin. I think it is not proper for the gentlemen to go into mere possibilities. We cannot object, if he will state what evidence they mean to bring forward: but that which has not been heard is certainly out of the question.

Mr Burr. No doubt, the counsel on the other side may show what they have to bring forward, although being shewn it may lead to absurdity. This is a common course, and a very fair one. They may suppose cases to any extent that they please.

Cb. Justice. No doubt of it. When gentlemen are proceeding to explain an act done, for instance, at Blannerhasset's island, they say that such or such testimony is relevant, and have a right to enforce it. In order that the question shall be brought upon the broadest ground, either side have a right to suppose or state cases.

Mr. Martin. There never has been any testimony offered for our consideration.

Cb. Justice. Yes, Sir, they have proceeded with the testimony, and have been stopped by the motion now before the court.

Mr. Wickham. I stated, that the abstract principle was in our favor, let the evidence be what it might; and, therefore, the amount of evidence was indifferent to the question.

Cb. Justice. So I understood it.

Mr. Hay. But Mr. Wickham did oppose the testimony that was given, on the ground of its insufficiency.

Mr. Wickham. That was the least part of my opposition.

Cb. Justice. The ground of opposition to the testimony already given, I believe was, that Mr. Burr was not present at the spot where the treason was said to have been committed.

Mr. M'Rae. The counsel for the prisoner appear to manifest some repugnance to this mode of proceeding; they seem to wish that, in replying to them, I should avoid supposing what might and can be proved. I am candid in confessing the same myself; for I did say, that it was not my wish to say a word until the

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whole evidence was gone through. If the gentlemen will now confess that the evidence shall be gone through, it would be a thousand times more agreeable to me, that the court should hear it, than that I should conclude my observations at this time.—If they would withdraw their motion for that purpose, I should be very glad. If not, I shall proceed under the direction of the Court.

Mr. Burr. If they have any other testimony on Blannerhasset's island, we will hear it, however absurd it is: but irrelevant testimony we cannot hear.

Ch. Justice. The motion is predicated on this:—that the acculed was not there. Now, as to the nature of the motion, no doubt can be entertained that other evidence cannot, at this moment, be heard. But as to the propriety of the argument, there can be no doubt, but facts may be brought forward which are not proved.

Mr. M'Rae. I suppose that I may be authorized, or permitted, to speak of evidence that has actually been heard: that which has not been heard, we will *suppose*, in our argument—Evidence, Sir, which, if addressed to this Court, would, in my judgment, serve to shew that the first position of the gentlemen cannot be supported—Evidence, which will shew that, although Aaron Burr was not present on the island, at that time, yet, that Aaron Burr was guilty of the Treason, if any person is guilty; and that, as such, he is amenable, if proved guilty.

Sir, is there any human being that can doubt, after hearing the testimony of Gen. Eaton, Commodore Truxton, and the Morgans, the treasonable intention of the prisoner? The credibility of all those witnesses is unimpeached; and Eaton's evidence is immediately to the point. [Here Mr. M'Rae took a review of the evidence which had been introduced.] Suppose, in addition to all this, we can prove that the men who came to Blannerhasset's island came thither by Aaron Burr's direction; that he had assisted in the enlistment of them; that he had furnished provisions for their support, and purchased boats for their use; that he was waiting for them at the mouth of Cumberland; that he had sent them orders to fly from the island without delay, since "the Philistines" would be shortly upon them; that they joined him at the mouth of Cumberland, and put themselves *under his command*; and were then *all armed* by the prisoner; suppose it should be proved, that afterwards, when a body of militia were coming to search his boat, he sunk all the arms in the river, for the purpose of concealing them; would any rational person doubt whether he was guilty of treason? We have authorities to shew that, even in England, he would be considered as a principal traitor, and indicted as such. Those authorities prove that a person who enlists men for a treasonable purpose: who acts in concert, and in league with them; and though not on the spot,

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acts elsewhere; is a principal traitor; and that all these are different *overt acts* of the same treason.

But Messrs. Wickham and Randolph have introduced certain authorities, on which they pretend that we must rely, and have attacked them as arbitrary and oppressive; as springing from the cruelty of judges like lord Coke, whom Mr. Wickham declared to have been without bowels, and Mr. Randolph without a heart. I will read one of those cases (Throckmorton's case, 1 St. Tr. 60) to shew how differently constituted the court who tried Throckmorton was from this court; how widely dissimilar the situation and treatment of Aaron Burr, during this trial, has been from Throckmorton's before the commissioners who tried him; and to demonstrate that that case has nothing to do with this.

Mr. M'Rae then read a large part of Throckmorton's case, 1 St. Tr. 60, from which it appeared that no counsel was allowed him; books were withheld from him; he was not listened to by the court; and confessions of others were read as evidence against him, without proof of his connexion with them. He strongly contrasted with those tyrannical proceedings, the advantages which Aaron Burr had enjoyed during this prosecution. Whereas Throckmorton had no counsel, Aaron Burr has six, most able and learned in the law; one of whom was attorney general of Maryland, another has been attorney general of the United States; a third for many years filled the same office in Virginia, and afterwards the office of attorney general for the United States, and the prisoner himself was once attorney general of the state of New-York. Throckmorton was allowed no books; but the prisoner has had the use of cart loads of them, both in and out of court. Instead of not being listened to, himself and his counsel have had uncontrolled freedom of speech, and have taken unexampled liberties with their opponents and with the government. And, (so far are they from permitting confessions of others to be read in evidence against him) they are now endeavoring to exclude, altogether, *any* testimony on the part of the prosecution. The counsel for the United States never thought of drawing any authority in their favor from that case; and such an intention ought never to have been attributed to them, for they abhorred and detested the cruelty and the tyranny of the proceedings against the *persecuted* prisoner in *that* case.

Mr. Wickham, in shewing what was the real situation of the accused, adverted principally to receivers, and accessories after the fact, instead of attending to the cases of those who were accessories before the fact. And, as he supposed there was a very great resemblance between those cases, he was pleased to suppose that we resorted to such cases as lady Lisle's, Fernley's, and Elizabeth Gaant's, in support of this prosecution, as recited in 4 St. Trials. These all relate to accessories, before the conviction of the principal. But, however the law in England may be, and

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whatever those who rely on British authorities may be inclined to think, as to reliance on such cases, I will inform the gentlemen that I am not inclined to rely on any such authorities. We do not contend that those persons who act in the capacity of receivers, would be guilty of treason. Suppose that a treason was committed on Blannerhasset's island, and some of those concerned in it were to make their escape, and take refuge in the house of some one who has not had an agency; we certainly should not suppose that such a receiver could be deemed guilty as a principal. This is not what we contend for, and therefore the gentlemen waste their time in referring to such authorities, as suitable for us: it is unnecessary for them to take so much trouble. The case of lady Lisle was, for affording room and support, ignorant of whom they were, to two persons, who were of the duke of Monmouth's party, and, for that alone, she was executed A. D. 1685. But there is not the least resemblance between any of those cases and the present, nor do we resort to, or rely upon any such authorities—We look not for any support from evidence which shall prove the connection of the prisoner with this circumstance after the fact. No, Sir, but on the contrary, the evidence shews plainly, that he was the first mover. I mean, Sir, to say, that the evidence which has been delivered, and the evidence, which we have not been permitted to bring forward, will prove *Aaron Burr* to be the contriver and supporter of this overt act. He was the *Alpha* and *Omega*, the *body* and the *soul* of this treason, and not an accessory at all, but a principal, and the very life of it. It would be idle indeed for us to regard him as an accessory after the fact, since we do not pretend to prove him as such—We do not regard him as an accessory at all, but as a *principal*; and as *chief among all principals*.

Mr. Wickham referred the Court to a note in Foster, for the purpose of proving that accessories are not intended to be considered as principals; and he took it for granted, let us be able to prove what we may, that we could not shew that the prisoner was more than an accessory; and therefore that he was not liable to be indicted as a principal in this treason. I do not say what is proven by this note, but if it proves the law to be either one thing or another, it is clear that actual presence is not indispensibly necessary to prove an indictment for a treason of such a nature, as this might be shewn to be. Although Foster, pages 9 and 22 have been quoted, in order to prove that those not actually concerned were not liable to be indicted as principals, I do not see what they are to prove by the reference, since those cases rather shew, that, after proving the overt act laid in the indictment, additional overt acts may be given in evidence to shew the *quo animo* of that which has been proven; and not that proof of the *personal* presence of the accused, is necessary, to charge him with the overt act of *levying war* at the island.—Neither Sir John Wedderburn, nor Deacon was present at

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the taking of Carliſle, but, they were charged with having a primary concern in the rebellion. Now, they may not have been indicted for taking the citadel of Carliſle, but, if we come to the bottom of it, we ſhall find that this was laid as an overt act to the rebellion, although they were not preſent. Now we have ſtated that the priſoner is guilty of acts at the mouth of Cumberland and at Beaver, but we are now confined to evidence at Blannerhaſſet's iſland. Now, Sir, may we not be permitted, in proving the overt act there, to produce the acts done elſewhere, if the *quo animo* might be ſhewn. I cannot ſee that the caſes referred to will ſerve any ſuch purpoſe as the gentleman intended.

But, Sir, theſe caſes will ſuit us very well in another part of this diſcuſſion, in our proving different overt acts, to eſtabliſh the crime charged. The caſes clearly prove the right of the proſecution, when they have ſhewn one overt act, to bring forward other overt acts in order to ſhew the intention with which the thing was done.

It is neceſſary to prove, that ſome act laid, was done by the priſoner. Here, Blannerhaſſet's iſland is laid as the ſcite of the treaſon, and he is charged to be concerned, or principal, in it; but, is that an argument, becauſe the overt act was committed there, that he was in his own proper perſon on the ſpot, committing it; or that he did it ſubſtantially himſelf? If we can ſhew, that he, of agents in that treaſon, was the principal agent, it cannot be neceſſary to ſhew that he was there in perſon.

I admit, that he muſt be there in his own proper perſon, or elſe he muſt be ſo concerned as to be the *primum mobile* of the war. Now, the caſe of Sir J. Wedderburn was reſorted to, but for what purpoſe, I cannot poſſibly conceive. To be ſure, it is ſtated that he was preſent at the place, but it is no where proved, or ſtated, that it was neceſſary for him to be there, or that the indictment would have failed! We ſay, however, that, mere evidence given, in any particular caſe that is reſorted to, that the party accuſed was preſent, is not to be regarded as evidence that he muſt be there in his own proper perſon, before the proſecution could be maintained.

Mr. Wickham has alſo referred the Court to Lord Balmerino's caſe 9 St. Tr. 605. for the purpoſe of ſhewing that he, not having been at the city of Carliſle, at the time the place was taken, he could not be indicted as a principal in that treaſon.—— Now, I think a more particular examination of that caſe would convince the gentleman that he cannot reſt upon that caſe neither for this purpoſe. Lord B. ſtated that he was not preſent at the time; but the fact is, that he was indicted in the uſual way, for *levying war*, for though he was not preſent on that day, he was there directly afterwards; and his coming into it, and holding it with an armed force, proved him as much to be

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a traitor as though he had been there on that day it was taken. He then was denominated a principal in the treason, and not an accessory after the fact.

The case in Foster p. 6, proves nothing whatever with respect to any *legal decision*: it is only a mere *nota bene*, stating that persons who were not concerned in the particular overt act in that passage mentioned, were not indicted.

Chief Justice. I do not know that it is material, but I will state the manner in which the argument in Lord Balmerino's case was urged. There were several overt acts laid in the indictment—one of them was for entering Carlise, which happened on the 10th. The second was for the slaughter that was occasioned by the entry; and the third was for holding the city against the king's authority. The counsel on the part of the prosecution said, that the day was not material; but Lord B. proceeded to shew that he was there on that day. The counsel then proceeded to shew that whether he did, or did not, commit that overt act, that he did commit the overt act of holding the place against the king's authority, and therefore he was guilty—Now Mr. Wickham argued that this was a proof of his being concerned in the rebellion, and upon that proof, and that only, he was convicted.

Mr. Wickham. That was the ground upon which I argued.

Mr. M'Rae. Well, it is certain that he did take possession of the city at some time, and therefore the day was immaterial in the indictment, provided that fact be proved. I have no sort of doubt, but that, if two or three overt acts were laid, it would be very easy to prove that his having taken part in any one of them, would remove the necessity of going on to prove the rest. I trust, however, that I shall be able to satisfy the court that any plot that is going on, he being convicted of any part of the treasonable plot, would be considered as guilty of all and every treasonable act that was executed.

For the purpose of shewing that, if the common law of England is not to govern us, there can be no such characters, as accessories before the fact, in this country. Mr. Wickham has quoted 10 St. Tr. 436, and Hobart 91, where he says this doctrine is recognized; that that, which is made criminal by a particular statute, and which was not criminal at common law, must be considered of according to common law principles, as to accessories, and they are not to be dealt with under particular statutes constituting the crime, except it is so specified. This is very unimportant to the subject, and I think the reference not so apt as he commonly gives. But whatever it may be, it was only the opinion of a lawyer, and not of a judge; and therefore it can be considered no more than the opinion of any other man. It is therefore unnecessary to give any farther answer to it.

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But Mr. Wickham ſays, that in this particular caſe, the act of Congreſs is to govern us, and that the common law is to have nothing to do with it. Sometimes we are told, that the common law is not in force, becauſe it ſhall not give to the conſtitution any narrower operation than ought to be given to it; and then again, for the purpoſe of getting rid of the operation of the conſtitutional weight on this proſecution, common law doctrines are reſorted to. But now we are told that the act of Congreſs is to govern, and as the act of Congreſs ſays nothing about this particular of acceſſories in treaſon, whilſt acceſſories in other crimes are mentioned, there can be no acceſſorial crime attached, or intended by it. Why, Sir, this is a mere aſſertion which is advanced, for it is evident, that the words of the conſtitution ſupercedes the neceſſity of any explanation. It means any who are concerned; any who are active in the overt act; it is immaterial where they are, if they are concerned in the ſame overt act of levying war, no matter where it is done. To theſe, the conſtitution applies its definition of traitors.

But he aſks, "if acceſſories in treaſon were to be puniſhed, why did not Congreſs provide for it?" Why, the anſwer is plain, ſuch a proviſion is unneceſſary, becauſe every perſon concerned before the fact in an overt act is a *principal*, which the conſtitution, if properly interpreted, will ſhew. It cannot be neceſſary, therefore, that an act ſhould be made concerning traitors, to call any of them by the new name of *accessories*.—— The plain interpretation of the Conſtitution, I think, is directly againſt the gentleman, and by it I am willing that our arguments ſhould be teſted; and if an act of Congreſs was made for the purpoſe, it could not ſpecify the doctrine which I have advanced in plainer light. As to receivers, or acceſſories after the crime, we know not why they have not been ſpecified; and it is very unimportant indeed to enquire. Now, he was very particular in his enquiries about the reaſon; and I think Congreſs have done very well indeed in not providing a puniſhment for what *be* called acceſſories, ſince it would be a very good ground for bad men to purſue their victims upon to any extent, and at their pleaſure. Thus, inſtead of its providing happineſs to ſociety, it would make the Conſtitution provide a means of injuring us.

But, Sir, who can be more guilty of Treaſon, in the eye of the law, or in the eye of common ſenſe, than the man who plots it?—The man who enliſts men—the man who provides boats, money, arms, proviſions, forage—the man of purſe and ſword—who can be more guilty than that man? Not the poor, ignorant, deluded man, who is called into the ſervice, without knowing why, or wherefore! There can be no compariſon between the guilt of the two. Now, for inſtance, what compariſon can there be between one of thoſe poor men who went down the ri-

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ver with Comfort Tyler from Blannerhaſſet's iſland, and the guilt of thoſe men who have plotted the Treaſon, furniſhed them with proviſions, and other means of waging war againſt the country. Is the conſtitution made to take the life of one of thoſe poor men, and, with impunity, to let the principal—the body and ſoul of the whole enterprize eſcape? I hope not.

But, Mr. Wickham ſays that the Conſtitution is made to prevent bad men in power from purſuing machinations of vengeance upon the victims whom they may be diſpoſed to mark out by accuſations of conſtructive treaſon. There can be no danger, Sir, under our Conſtitution, of any one being puniſhed innocently: and I would rather it would be always conſidered ſo, upon the ſcore of humanity. I hope that there can be no danger of victims being marked out in this country: nor do I believe any man would be bold enough to do it. The Conſtitution has provided well againſt this, by making two witneſſes neceſſary for the conviction of any perſon under the crime of treaſon; and not to put it to the will of any miſchievous man, whoſe want of character, or whoſe diſpoſition, might arrogate to himſelf a power which he could not procure, or ſuſtain, at the will of the people, and thus to trample the conſtitution itſelf under foot with impunity. Mr. Wickham, in conformity with the idea, ſtated a caſe in the abſtract, (and he has ſtated ſeveral things upon *abſtract* principles), and not at all applicable to the caſe of the priſoner. He brought up a ſuppoſition that the government might want to ſingle out a man for a victim, reſiding in Georgia; and might accuſe him of the crime of inſurrection in New-Hampſhire, where he never had been; they might drag this innocent man a thouſand miles from home, to puniſh him for a crime ſaid to have been done in New-Hampſhire, when he had done nothing wrong, and a ſingle witneſs would convict him of treaſon. Now, this, to be ſure, is a ſtrange way of abſtract reaſoning It could not be fair, in the firſt place, to ſpeak of the conviction of a perſon for treaſon by the evidence of a ſingle witneſs; nor is it to be ſuppoſed that a man can be poſſibly convicted upon a charge, where, and of which, he knows nothing about.

Now, Sir, I will aſk permiſſion to ſtate a caſe in the abſtract. Suppoſe there were an excellent chief magiſtrate,—one whom a great majority of the people of this country reſpected and loved, (I ſpeak in the abſtract way.)—this chief magiſtrate had been re-elected to office by the *ſtrong* ſuffrages of his fellow citizens; this is a ground, as high as any man can ſtand; there can be no neceſſity of this man doing any thing to increaſe his popular influence—he ſtands as fair with his fellow citizens as a man can ſtand; and far above the ſhafts of *malice* or *envy*.——But, Sir, ſuppoſe another man, whoſe natural, or ambitious diſpoſition ſhould lead him to engage in mal-practices and meaſures, which

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his country muſt deplore; and whoſe character is fallen as low, if not lower, than man can fall; (literally ſo)—fallen in "*duſt and aſhes*"—ſhould it be thought neceſſary that the Conſtitution, or Law, ſhould guard, or protect this man, (fallen by the ſtrong voice of his country) elevated as his character in ſome reſpects might be? No, Sir; although we have rights, they do not guard us againſt our evil practices. I follow the example ſet before me, of ſpeaking upon abſtract principles: but, I think that this ſuppoſed caſe may ſerve to ſhew the immenſe danger that might ariſe to the people of the U. States under ſuch a direction, which danger does not exiſt under our preſent adminiſtration.

The Conſtitution did intend to preſerve the liberty of the people: the Conſtitution did intend to provide a ſafe guard for itſelf: the Conſtitution did intend, that a man who committed Treaſon, however high his character might have been, ſhould not commit it with impunity:—and the Conſtitution did intend, and provide, that no *innocent man* ſhould be convicted for any crime, whether he was high or low in life. If the conſtitution be carried into effect, agreeably to the intention of thoſe, who formed it, there can be no danger from the vengeance, or malignity, of any man on earth. My view of it is, that it is calculated to ſecure the unpreſcriptable rights of the citizens, and to render the government permanent and ſecure againſt the deſigns, and utmoſt efforts of evil deſigning men. Theſe are the two great objects which were in view. But give to it the interpretation it had on the other ſide, and then, no *plot* for committing treaſon, however deep laid, or malignant in its nature, (as we have ſuppoſed this to be,) can exiſt: and if he may poſſeſs the power, even of ubiquity, (for if he is not preſent in perſon, he is actually preſent in every particle of this plot,) you cannot make him account for it.

But, Sir, what may be the conſequence, where a man may commit a treaſon, and not chuſe to be preſent at the place or time where the treaſon is committed? Why, the greateſt poſſible danger to the government; and the inevitable ruin of every man that ſhall be taken in by him to join in the dangerous enterprize, however plauſible may be his pretexts. Why, certainly, the man who plots and carries on the treaſon muſt be the principal traitor, according to the faireſt interpretation that could be imagined. Foſter, p 362, is a paſſage that will ſhew that our conſtruction is juſt, and that common ſenſe will adopt this principle. But farther, it is that which the ſupreme Being has been pleaſed to adopt, (and I ſuppoſe my worthy friend will not be profane enough to queſtion ſuch an authority as that,) See 1 Kings: 21 ch. Ahab's killing Naboth 2 Samuel, 11 ch. David's killing Uriah. Now, it is clear, that theſe men were guilty of murder, although they were not the immediate perpetrators—in ſound ſenſe, and to common underſtanding, they contrived it;

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and it was done by their will. And of so high authority is this interpretation, that I believe, if the question were to be asked of any man, who committed those murders in fact? it would be answered, Ahab and David. Then, Sir, the man who contrived Treason to be committed, and who is, himself, *seit* in every part of it, is more properly to be considered as a traitor, than as a mere agent.

But, I will admit, without referring to the numerous cases which have been quoted, that there is, in some of them, a distinction made between an accessory and a principal; and that some of the cases go a great way, in proving, that the accessory ought not to be proceeded against without the principal be first convicted—and that one of the first steps in such a case should be to produce a record of the conviction of the principal. But, Sir, the great, and distinctive difference between us, is this: In a case of common felony, the doctrine would be just; but in capital crimes, "every person present, *in the sense of the law*, is involved, equally with him who gives the mortal blow." Fost. 353. 354. Now, what is this case? It shews you the prisoner actually present at Beaver in Pennsylvania, where the operations commenced—it shews you the prisoner as having been first in the formation of the plot, furnishing provisions, arms, and money; enlisting men, and here transporting them towards their destination. In Ohio, and in Kentucky, we find him engaged in the same business, until he met the party so designed, at the mouth of Cumberland. He was, then, the life and soul of those who engaged to execute the fact, and effectually present in every thing that was done. We proceed against the prisoner as a principal in the treason; and farther, to shew that he might be a principal, although not personally, yet legally present, and ought to be proceeded against accordingly, I will refer to 1 Hale 439, who answers the enquiry of "who should be said to be present," in a criminal act? This case relates to persons who were of the party, though in another room of the house when an attrocious act was committed. Now, Sir, this may be taken to apply to persons, who, being of the party who committed a treason, and were in a different State of the union. Being all in one country, and having the same object in view, any criminal act done by one, towards that object, is considered in law as the act of the whole. So, as to the killing of the keeper of the park, those who were engaged in the same enterprize, although in another part of the same park, were considered as accessories in the murder, and were executed under that decision. (Lord Dacre's case.) So, in a case of burglary, one staid at the lane's end to watch, as the prisoner staid to watch in Kentucky, and to warn of the danger, while the others did the act. Fost. 349. 350. So that the law does not require that an accomplice should be *actually* and *personally* present, to make him a principal. Each has his part assigned

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to him—some to commit the fact, some to prevent surprize, and some to aid an escape. "They are all, in the *eye* of the law, present at it, for it was made a *common cause*." If there had been an authority written on purpose to fit this case, I do not think that one stronger could be made than the one last quoted. If the circumstances are compared, I think they will appear as similar as two of any different denominations can be conceived to be.

2 Dallas, 355. 356 will shew an authority of the Court of the United States, who *acted* upon a case of this sort. Judge Patterson in Mitchel's case, decided, that a man who was not actually, personally present at the scene of Treason, was, in the view of the law present, upon the treason being proved; and upon its being proved that he was concerned in it, consenting to the same design. Now, here was an adjudicated case which, in my opinion, is not half so strong as this, where the person who *advised*, or *procured*, the act to be committed, ought to be considered as the principal, although he kept out of the way.

Now, here was a case of treason upon Mitchel—he was stated by one witness to be at Crouche's fort, where the Judge thought the consultation of the treason was held: he acted with them, and was about with them, but there was no proof that he was at Neville's, where the treason was committed; yet, Judge Patterson said, that he was liable as a principal traitor.

Gentlemen have said that the opinion of the Supreme Court, given in the case of Bollman and Swartwout, is not to be considered as regularly given; and, therefore, being extra-judicial, is no authority. I am not able to say, as to that. I have read the opinion, and it really does appear, that all the parts which relate to the question of "what constitutes Treason," are to be regarded as strictly applicable to the cases before the Court. I do not know particularly, what arguments were, or were not held before that Tribunal, nor do I think it so necessary to know, on this subject: it is enough for me to read the opinion itself, to shew that this was a subject upon which they deliberated, and maturely deliberated; else they would not over and over again have distinctly specified what was Treason. Our subject now, however, is specifically to know, whether a person who was not present at the spot, could be guilty of Treason: and upon this I will read a part of that opinion, which it will be impossible to convince me is not valid and authoritative. Sect. 6, of the opinion says, "if actual war be levied, that is, if a body of men be actually assembled, for the purpose of effecting, by force, a treasonable purpose, all those who perform any part, however minute, and however remote from the scene of action; and who are actually leagued in the general conspiracy, are to be considered as Traitors." Now surely, Sir, I need not repeat how many parts the prisoner has taken in this conspiracy: he was not merely leagued, but the very author of the whole of it. There cannot be a doubt as to the part he took in it, according to the facts which have been proved.

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I shall content myself with what has been said for the purpose of proving that, whether this be considered as relating to the Constitution and Law, or as to the law of England, in either point of view the indictment against the prisoner is proper.—Now, if Aaron Burr can be considered as an *accessory*, or *accomplice*, to whom can the epithet *principal* be applied? Who is the principal, if he is not, who is at the head of a transaction?

It is unnecessary, Sir, that I should reply to the remarks of the gentleman concerning the mode of proceeding against accessories; and it is also unnecessary that I should reply to any thing said, as to the form of indicting accessories, because I have supposed, and maintained, that this is not such a case, and therefore there can be no need for me to enter into the question of the previous conviction of the principal. This is not a case of accessorial or derivative Treason, but the prisoner is a principal.

But it is proper that I should notice a remark or two that was made by both of the gentlemen, concerning the indictment: I intend my arguments to apply to both. Mr. Wickham fancied that he had discovered a very important defect in the indictment, to which he exultingly called the attention of the Court. He thought that the omission of "*public*" before "war" in the indictment was fatal to it, and brought a number of cases to prove that it was necessary to charge a *public* war: as though the charge of levying war merely was not sufficient to sustain the indictment.

Mr. WICKHAM. I wish to save the gentleman this part of the argument. The reason I stated it is this: it is required that the party should be informed in the indictment whether he is charged with an act of a public nature, as an *overt* act necessarily must be: but here he is charged merely with levying war, which might be an act of a private nature. I urged this, not as a defect in the indictment, but to rebut the argument on the other side, which contended for the openness of the act committed, he not being present. The war ought to have been stated to be open, otherwise it could not be presumed that he had any notice of it. However, I did concede the day following, that this word, "public," was not inserted in the second indictment of Fries, and therefore was not so material as was at first supposed.

Mr. BURR. If the attorney thinks proper, I will now permit them to insert the word *public*.

Mr. M'RAE. But it is stated that another material omission is made, the indictment not having named any persons as accomplices with the prisoner, though accomplices are spoken of. 5 cases were referred to, to shew that it is common in indictments to name accomplices.

CHIEF JUSTICE. I did not understand that it was said that the indictment was not good on account of this omission, but that it was requisite to be inserted in order to shew that he did act with others as accomplices.

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Mr. M'RAE. I did understand it to be stated as a defect in the indictment, and was prepared to shew that the indictment could be supported, notwithstaning these omissions. I had prepared, and examined the following cases in opposition to those cited by Mr. Wickham viz. 6 St. Tr. 60. Christopher Low's case. 6 St. Tr. 229. 5 St. Tr. 17. 3 St. Tr. 997. 4 St. Tr. 208. 4 St. Tr. 142. 4 St. Tr. 131, and lastly, the case of Fries.

The only remaining subject which is necessary to be considered is the question whether so much has or has not been proven, as to the overt act, as to satisfy the Court that farther evidence ought to be heard. The gentlemen have referred the Court to a great number of authorities upon this subject, to shew what treason is. As this is a question before the Court, and can be digested in their thoughts better than even the whole bar connected can shew it to them, I shall not think it necessary to go through the examination of their or other authorities. I shall therefore content myself with a conviction that it is impossible to shew to this Court what they do not already possess. I will only refer to a few cases which I conceive contain the true definition of this crime. 5 St. Tr. Vaughan's case 17 and 21. Foster 208. 218. 1 East 67. 68. I think these authorities go to prove that treason might be committed without any thing like actual force being used: and that is a doctrine compleatly settled by the Supreme Court. Sect. 6, &c. It is not merely once stated, but over and over again repeated. I do not myself believe that even *arms* is necessary to be in the hands of those concerned; I have imagined that the mere meeting for a treasonable purpose, if there was other extrinsic evidence to prove that purpose would be sufficient. The reasoning in *East* is good on this subject; and the doctrine of the Supreme Court is corroborative. The holding of *arms* has generally been required, but then it was principally intended as an evidence of the purpose rather than any thing else. Now if the treasonable *intention* could be proved without the proof of their holding arms, (the assemblage being proved) it would be sufficient; and this I consider is literally the opinion of the Supreme Court.

The opinion of Judge Chase, referred to in that of the Supreme Court, was read the other day, to justify the doctrine that actual force and arms were necessary in the charge of treason. I have read it, Sir. It may be that the Court intended to adopt the sentiment contained in it, but I do not think it could be so. It is stated that Judge Chase *gave* this opinion, but it is not stated that the Court *did* adopt it, as a principle, in all its parts; and I think the contrary is extremely likely, because the judgment of the Court on *that* subject is so different from the opinion which he then gave: for I do not think that they would have given so variant an opinion to a doctrine which they had admit-

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ted. There is one part of the opinion so extremely appoſite to the caſe now before the Court that I muſt refer to it. Sect. 44. "The travelling of individuals to the place of rendezvous would, perhaps, not be ſufficient. This would be an equivocal act; and has no warlike appearance. The meeting of particular bodies of men, and their *marching* from places of partial, to places of general rendezvous, would be ſuch an aſſemblage." Now, Sir, is not this the very caſe under conſideration? Was not the body under Comfort Tyler going from a *partial* to a place of *general* rendezvous at Cumberland?

But ſuppoſe the caſe was to be conſidered as dependant upon the evidence, merely, which has been given, if the Court ſhould undertake to decide upon the queſtion whether the overt act has or has not been committed, they would invade the province of the *Jury*, who are judges as to *law* and *fact*.

Now as to the queſtion of whether this aſſemblage were or were not armed, though it is my opinion that it is not neceſſary to be proved, yet the evidence will ſhew that they were armed, although it is not ſtated that there were arms enough for every one on the iſland. Yet it is ſtated by one witneſs (Love) that he believed they were prepared to defend themſelves: and one witneſs (Albright) ſays that there was *actual force* uſed, by levelling ſome muſkets at a man (Gen. Tupper) who came there as a peace officer.

Now, Sir, do not theſe circumſtances give an appearance of *treaſon* ſufficient to let us in more compleatly to prove that the overt act was committed, and that the priſoner was the principal, although not there and then preſent? I contend that we are not bound to prove, in the firſt inſtance, every thing neceſſary to explain the nature of the overt act, *at one place*, becauſe, overt acts, *at other places*, may be proved, by way of explanation, or aggravation, or to ſhew the *quo animo*. See 9 and 22 Foſter. 4 St. Tr. 687 to 696 and 722. 6 St. Tr. 286. 287. 1 Eaſt 121. 122. 1 Dallas 35. All theſe authorities go to ſhew that, evidence being offered of the commiſſion of the overt act laid in the indictment, you may adduce other evidence to ſhew the intention with which the firſt was done. Now, if you have heard enough to prove that the overt act has been committed, where is the neceſſity, according to the arguments uſed, to go into other overt acts, except it be to ſhew the *quo animo*? Why it is admitted for the very purpoſe, and for that purpoſe we aſk it to be heard: that there ſhall be left no ſort of doubt as to the *character* of the tranſaction.

But, ſays the gentleman, the evidence has been given to the Court, and they can judge of its weight upon the charge of treaſon made. Let us ſuppoſe that the Court ſhould give their opinion that the evidence has ſufficiently proved the overt act, would they not wreſt from the priſoner his inherent right of

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trial by Jury? What then would become of the boasted right of trial by Jury, if the case is decided by the Court? He is gone, let the Jury think what they would on the subject

But, is this a question proper for the Jury to decide? Yes, Sir, and neither in England, nor in this country will a Court *attempt* to decide: I am sure that they will not take it from the Jury: the confidence I have in *this* Court will not permit me to indulge the idea.

I shall not longer trouble the Court, than to quote a few authorities to shew that it is proper for the Jury alone to decide upon the amount and strength of evidence: it is a question of fact which cannot be taken from them, under any possible circumstances, without infringing their rights. 1 Fail 66. 67. see also Judge Iredell's opinion. Fries's trial p. 9. 174 175 (these I think were given to the Court by Mr. Hay) these authorities I think are conclusive. But if there should yet a doubt remain, I refer the Court to their own opinion on the question of the order of evidence, which declares that the weight of the evidence *must be decided by the Jury*. The Court having declared this opinion, I am perfectly satisfied to leave the question in their hands; and shall submit with respect to their decision: at the same time must express my earnest desire that, in order to do justice to the cause, we may be permitted to go through with our evidence, and submit it to an enlightened and unbiassed Jury to decide.

TUESDAY, August 25.

MR. WIRT. May it please your honors.

It is my duty to proceed on the part of the United States in opposing this motion. But I should not deem it my duty to proceed, if I thought the motion itself well founded. I stand here with the same independence which belongs to the attorney of the U. States, and as he would certainly relinquish the prosecution the moment he became convinced of its injustice, so also, most certainly would I:— The humanity and justice of this nation would revolt at the idea of a prosecution pushed on against a life which stood protected by the laws; but whether they would or not, before I would plant a thorn in my own heart to rankle there for life, by opening my lips, unconscientiously in such a case, I would seal them up forever. Believing, however, as I do, that this motion is a mere manœuvre to obstruct the enquiry, to wrest the trial of the facts from the proper tribunal, the jury, and embarrass the court with a responsibility which it ought not to feel, I hold it my duty to proceed—for the sake of the Court, for the sake of vindicating the trial by Jury, now sought to be violated, for the sake of full and ample justice in this particular case, for the sake of the future peace, union and independence of these states, I hold it my bounden duty to proceed.

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And while I do ſo, let me requeſt the priſoner and his counſel to conſider the difficulty of cloathing my argument in terms which may be congenial with their feelings. The gentlemen appear to me to feel a very extraordinary and unreaſonable degree of ſenſibility on this occaſion. They ſeem to forget the nature of the charge and that we are the proſecutors. We do not ſtand here to pronounce a panegyrick on the priſoner, but to urge home upon him the charge of treaſon againſt the United States. *Treaſon* is the charge; when we ſpeak of treaſon we muſt call it treaſon; when we ſpeak of a traitor, we muſt call him a traitor; when we ſpeak of a plot to diſmember the union, to undermine the liberties of a great portion of the people of this country, and ſubject them to an uſurper and a deſpot, we are obliged to uſe the terms which convey theſe ideas. Why, then, are gentlemen ſo ſenſitive? Why, on theſe occaſions ſo neceſſary and ſo unavoidable, do they ſhrink back with as much agony of nerve as if, inſtead of a hall of juſtice, we were in a drawing room with Col. Burr, and were barbarouſly violating towards him, every principle of decorum and humanity.

We have, indeed, been invited by Mr. Wickham to conduct this argument on abſtracted ground; and have been told that it is expected to be ſo conducted:—but, ſir, if this were practicable, would there be no danger in it; would there be no danger while we were mooting points, purſuing ingenious hypotheſes, chaſing elementary principles over the wide-extended plains and Alpine heights of abſtracted law, that we ſhould loſe ſight of the great queſtion before the court. This may ſuit the purpoſes of the counſel for the priſoner; but it does not, therefore, neceſſarily ſuit the purpoſes of truth and juſtice. It will be proper when we have derived a principle from law or argument, that we ſhould bring it to the caſe before the Court in order to teſt its application and its practical truth: In doing which we are driven into the nature of the caſe and muſt ſpeak of it as we find it. But, beſides, the gentlemen have themſelves rendered this totally abſtracted argument impoſſible; for one of their poſitions is, that there is no overt act proven at all. Now, that an overt act conſiſts of fact and intention has been ſo often repeated here, that it has a fair title to juſtice. Vaughan's epithet of a *decantatum*; in ſpeaking then of this overt act, we are compelled to enquire not merely into the fact of the aſſemblage, but the intention of it; in doing which we *muſt* examine and develope the whole project of the priſoner. It is obvious, therefore, that an *abſtract* examination of *this point* cannot be made: and ſince the gentlemen drive us into the examination, they cannot complain if, without any ſoftening of lights or deepening of ſhades, we exhibit the picture in its true and natural ſtate.

This motion, ſir, is a bold and original ſtroke in the noble ſcience of defence. It ſhews the hand and genius of a maſter. F,

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while it gives to the priſoner the full benefit of his legal defence, of the whole and ſole defence which he would be able to make to the jury, if the evidence were gone through, it cuts off from the proſecution all that evidence which goes to connect the priſoner with the aſſemblage on the iſland, to explain the deſtination and objects of that aſſemblage, and to ſtamp, beyond controverſy, the character of treaſon upon it. Connect this motion with that which was made by the priſoner the other day, to compel us to begin with proof of the overt act, in which, from their zeal, gentlemen were equally ſanguine, and obſerve what would have been the effect of ſucceſs in both motions; we ſhould have been reduced to the ſingle fact, the inſulated fact of the aſſemblage on the iſland, without any of that evidence which explains the intention and object of that aſſemblage; thus gentlemen would have cut off all the evidence which carries up this plot almoſt to its conception; which, at all events, deſcribes the firſt motion which quickened it into life, and follows its progreſs until it attained ſuch ſtrength and maturity as to throw the whole weſtern country into conſternation—Of the *world* of evidence which we have, we ſhould have been reduced to the ſpeck, the atom which relates to Blannerhaſſet's iſland; General Eaton's publiſhed narration, hitherto ſo much and ſo unjuſtly reviled, would have been without the ſtrong corroboration of Commodore Truxton, and the ſtill ſtronger and moſt extraordinary evidence of the Morgans. Standing alone, gentlemen would have ſtill proceeded to ſpeak of that affidavit as they have heretofore done; not declaring that what general Eaton had ſworn, was not the truth, but that it was *a moſt marvellous ſtory! a moſt wonderful ſtory!* and thus would they have continued to ſeek in the bold and wild extravagance of the project itſelf, an argument againſt its exiſtence, and a refuge from public indignation. But that refuge is taken away. General Eaton's narration ſtands confirmed beyond the poſſibility of rational doubt. But I aſk what inference is to be drawn from theſe repeated attempts to ſtifle the proſecution and ſmother the evidence. If the views of the priſoner were, as they have been ſo often repreſented by one of his counſel, *highly honourable to himſelf, and glorious to his country*, why not permit the evidence to diſcloſe theſe views? Accuſed as he is of high treaſon, he would certainly ſtand acquitted, not only in reaſon and juſtice, but by the maxims of the moſt ſqueamiſh modeſty, in ſhewing us, by evidence, all this honor and this glory which his ſcheme contained.—No, ſir, it is no ſqueamiſh modeſty; it is no faſtidious delicacy that prompts theſe repeated efforts to keep back the evidence; it is apprehenſion; it is fear; or rather, it is the certainty that the evidence, whenever it ſhall come forward, will fix the charge; and if ſuch ſhall appear to the court to be the motive of this motion, your honors, I well know, will not be diſpoſed to ſacrifice public juſtice committed to your charge, by

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aiding this ſtratagem to elude the ſentence of the law; you will yield to the motion no farther than the rigor of legal rules ſhall imperiouſly conſtrain you.

I come now to anſwer the argument of the gentleman (Mr. Wickham) who ſpoke firſt in ſupport of this motion. I will treat the gentleman with candour. I will not follow the example which he has ſet me on a very recent occaſion. I will not complain of flowers and graces, when none exiſt. I will not, like him, in reply to an argument, as naked as a ſleeping *Venus*, tho' certainly not half ſo beautiful, complain of the painful neceſſity I am under, in the weakneſs and decrepitude of logical vigor, of lifting firſt this flounce and then that furbelow, before I can reach the wiſhed for point of attack. I keep no flounces or furbelows ready manufactured and hung up for uſe, in the millinery of my fancy—and if I did, I think I ſhould not be ſo indiſcreetly impatient to get rid of my wares as to put them off on improper occaſions. I cannot promiſe to intereſt you by any claſſical and attic alluſions to the pure pages of Triſtram Shandy; I cannot give you a ſquib or a rocket in every period; for my own part I have always thought theſe flaſhes of wit, (if they deſerve even that name,) I have always thought theſe meteors of the brain, which ſpring up with ſuch exuberant abundance in the ſpeeches of that gentleman, which play on each ſide of the path of reaſon, or ſporting acroſs it with fantaſtic motion, decoy the mind from the real point of enquiry, no better evidence of the ſoundneſs of the argument with which they are connected, nor, give me leave to add, the vigor of the brain from which they ſpring, than thoſe vapours which ſtart from our marſhes and blaze with a momentary combuſtion, which, floating on the undulations of the atmoſphere, beguile the traveller into bogs and brambles, are evidences of the firmneſs and ſolidity of the earth, from which they proceed.

I will endeavour to meet the gentleman's poſitions fully and to anſwer them fairly; I will not, as I am advancing towards them, meaſure with my mind's eye, the height, breadth and power of the propoſition; if I find it beyond my ſtrength, halve it; if ſtill beyond my ſtrength, quarter it; if ſtill neceſſary, ſubdivide it into eighths; and when by this proceſs I have reduced it to the proper ſtandard, take one of theſe ſections and toſs it with an air of elephantine ſtrength and ſuperiority. If I find myſelf capable of conducting, by a fair courſe of reaſoning, any one of his propoſitions to an abſurd concluſion, I will not begin by ſtating that abſurd concluſion as the propoſition itſelf which I am going to encounter. In commenting on the gentleman's authorities, I will not, with ſarcaſtic politeneſs, thank him for introducing them; declare that they conclude directly againſt him; read juſt ſo much of the authority as ſerves the purpoſe of that declaration, omitting that which contains the true point of the caſe which makes againſt me; nor if forced by a direct call

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to read that part alſo, will I content myſelf by running over it as rapidly and inarticulately as I can, throw down the book with a theatrical air, and exclaim, "juſt as I ſaid," when I know it is juſt as I had not ſaid. I know that by adopting theſe arts, I might raiſe a laugh at the gentleman's expence; but I ſhould be very little pleaſed with myſelf, if I could enjoy a laugh ſo raiſed. I know, too, that by adopting ſuch arts, there will always be thoſe ſtanding around us, who have not comprehended the whole merits of the legal diſcuſſion, and with whom I might ſhake the character of the gentleman's ſcience and judgment as a lawyer. I hope I ſhall never be capable of ſuch a wiſh; and I had hoped that the gentleman himſelf felt ſo ſtrongly that high, aſpiring and ennobling magnanimity which I had been told that conſcious talents rarely failed to inſpire, that he would have looked with diſdain on the poor and fleeting triumph which could be gained by arts like theſe.

I proceed now, Sirs, to anſwer his points ſo far as they could be collected from the general courſe of his ſpeech. I ſay ſo far as they could be collected; for the gentleman, altho' requeſted before he began, refuſed to furniſh us with his points in writing. It ſuited better his partizan ſtyle of warfare, to be perfectly at large; to change his ground as often as he pleaſed—to-day on the plains of Monmouth—to morrow at the Eutau Springs. He will not cenſure me, therefore, if I have not been correct in gathering his points from a deſultory diſcourſe of four or five hours length. I truſt, however, that I have been correct—it was my intention to be ſo—for I can ſee neither pleaſure nor intereſt in *miſrepreſenting* any gentleman; and I now beg the Court or the gentleman, if he will vouchſafe it, to ſet me right if I have miſconceived him.

I underſtand him then, Sir, to reſiſt the introduction of farther evidence under this indictment on theſe four grounds.

1. Becauſe Aaron Burr, not being preſent on the iſland at the the time of the aſſemblage, cannot be a principal in the treaſon within the conſtitutional definition; nor within the *laws* of England.

2. Becauſe the fact muſt be proved as laid; and as the indictment charges the priſoner with levying war with an aſſemblage on the iſland, no evidence, to charge him with that act by relation is relevant to this indictment.

3. Becauſe if he be a principal in the treaſon at all, he is a principal in the ſecond degree; and his guilt being of that kind which is termed derivative, no parole evidence can be let in to charge him until we ſhall ſhew a record of the conviction of the principals in the firſt degree.

4. Becauſe no evidence is relevant, to connect the priſoner with others, and thus to make him a traitor by relation, until we ſhall previouſly ſhew an act of treaſon in thoſe others; and the aſſemblage on the iſland was not an act of treaſon.

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Let us examine the firſt ground—it is becauſe Aaron Burr, not being preſent on the Iſland at the time of the aſſemblage, cannot be a principal in the treaſon within the conſtitutional definition, nor within the laws of England.

In many of the general reflections expreſſed by the gentleman under this head I perfectly accord with him; as that the conſtitution intended to guard againſt arbitrary and conſtructive treaſons; that the principles of ſound reaſon and liberty require their excluſion. I have no objection either to his poſition, that the conſtitution is to be interpreted by the rules of reaſon and of moral right. I fear, however, that I ſhall find it difficult to accommodate both the gentlemen who have ſpoken in ſupport of the motion; for while Mr. Wickham demands reaſon for the guide of our interpretation, Mr. Randolph exclaims "ſave us from the deductions of common ſenſe." A kind of reaſon which is not common ſenſe, would, indeed, be adapted to the joint purpoſes of both the gentlemen: but as that is a ſpecies of reaſon of which I have no very diſtinct conception, I hope the gentlemen will excuſe me for not employing it. Let us return to Mr. Wickham. Having read to us the Conſtitutional definition of treaſon and given us the rule by which it was to be interpreted, it was natural to expect that he would have proceeded directly to apply that rule to the definition, and give us the reſult. But while we were expecting this—even while we have our eyes upon the gentleman, he vaniſhes like a ſpirit from American ground, and we ſee no more of him, until re-ſurging in England, by a kind of intelligent magic, we find him in the middle of the 16th century, complaining moſt dolefully of the ſtate of my Lord Coke's bowels. Before we follow him in this excurſion, let us enquire what it was that made the gentleman ſtart with ſuch terror from the regular track of his argument. It was, Sir, the deciſion of the Supreme Court in the caſe of Bollman and Swartwout; it was that judicial expoſition of the conſtitution by the higheſt court of the nation, upon the very point which the gentleman was conſidering. Sir, if the gentleman had believed this deciſion favorable to him, we ſhould have heard of it in the beginning of his argument, for the path of enquiry in which he was, led him directly to it. Interpreting the American conſtitution he would have preferred no authority to that of the Supreme Court of the country. Yes, Sir, he would have immediately ſeized this deciſion with avidity; he would have ſet it before you in every poſſible light; he would have illuſtrated it; he would have adorned it: he would have expanded it; you would have ſeen it, under the action of his genius, loom with all the varying grandeur of our mountains in the morning's ſun. He would not have relinquiſhed this deciſion, for the common law; he would not have deſerted a rock ſo broad and ſo

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ſolid, to walk upon the waves of the Atlantic. But he knew, Sir, that this deciſion was againſt him; he felt, too, that it cloſed againſt him completely the very point which he was labouring. Hence it was, that the deciſion was kept ſo ſeduouſly out of view, until, from the exploded materials of the common law, he tho't he had reared a Gothic edifice, ſo huge and ſo dark as quite to overſhadow and eclipſe it. Let *us* bring it from this obſcurity into the face of day. We who are ſeeking truth and not victory, whether right or wrong, have no reaſon to turn our eyes from any ſource of light which preſents itſelf; and leaſt of all from a ſource ſo high and ſo reſpectable as the deciſion of the Supreme Court of the United States. Let it be remembered that the enquiry is, whether *preſence* at the overt act is neceſſary to make a man a traitor; *it is neceſsary*, ſay the gentlemen—what ſays the Supreme Court? "It is not the intention of the Court to ſay that no individual can be guilty of this crime who has not appeared in arms againſt his country; on the contrary it war be actually levied, that is, if a body of men be aſſembled for the purpoſe of effecting by force a treaſonable purpoſe, all thoſe who form any part, however minute or *however remote from the ſcene of action*, and who are actually leagued in the general conſpiracy, are to be conſidered as traitors."* Here then we find the Court ſo far from requiring preſence, that they expreſsly declare that *however remote* the accuſed may have been from the ſcene of the treaſonable aſſemblage, he is ſtill involved in the guilt of that aſſemblage; *that he was leagued in the general conſpiracy* which produced it, is ſufficient to make the overt act his own.—The Supreme Court being of that opinion, proceeded to an elaborate examination of the evidence to aſcertain whether there had been a treaſonable aſſemblage. They look to the depoſitions of gen. Eaton and Gen. Wilkinſon, to the cyphered letter, to the declaration of Swartwout, that Burr was levying an armed body of ſeven thouſand men; and they look to theſe parts of the evidence expreſsly for the purpoſe of diſcovering whether it was probable that *Burr* had actually brought thoſe men together; not whether Bollman and Swartwout were preſent at any ſuch aſſemblage; they knew if any ſuch aſſemblage had taken place, Bollman & Swartwout muſt have been, at the time, at the city of Orleans, or on their way thither; indeed, the whole reaſoning of the court proceeded on the fact as admitted, of the priſoner's abſence. Why then, the laborious inveſtigation which the court make as to the probability of *Burr's* having brought his men or any part of them together, unleſs the guilt of that aſſemblage was to be imputed to Bollman and Swartwout? If their abſence had been ſufficient to excuſe them, that fact was admitted, and the

* *Deciſion of the Supreme Court, in case of Bollman and Swartwout.*

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enquiry would have been a very ſhort one. But the Court having previouſly decided that the fact of preſence or abſence was unimportant, that it made no odds how far diſtant the accuſed might be from the treaſonable aſſemblage, it became the unavoidable duty of the Court to proceed to the enquiry whether any ſuch aſſemblage had taken place; and if the evidence had manifeſted that fact to their ſatisfaction, it is clear that in the opinion of that Court the priſoners would have been as deeply involved in the guilt of that aſſemblage as any of thoſe who actually compoſed it.

The counſel knew that their firſt point was met directly by the counter authority of the ſupreme court; they have impliedly if not expreſsly admitted it; hence they have been reduced to the neceſſity of taking the bold and difficult ground that the paſſage which I have read is extra-judicial—a mere *obiter dictum*. They have *ſaid* this; but they have not attempted to *ſhew* it. Give me leave to ſhew that it is not an *obiter dictum*; that it is not *extra judicial*; but that it is a direct adjudication of a point immediately before them. The court made no formal diviſion of the ſubject. It divided itſelf. The arreſt of Bollman and Swartwout at New-Orleans, and the fact that they had not been preſent at any aſſemblage of the traitors in arms, were notorious and admitted. The caſe neceſſarily preſented to the court three diſtinct queſtions: 1. Are theſe men leagued in any treaſonable conſpiracy? 2. Is the fact of their being leagued with it, ſufficient, of itſelf, to implicate them in the guilt of any overt act of that treaſon? or is it neceſſary that they ſhould actually have borne a part in that overt act? 3. Has there been an overt act? Now if the court had been ſatisfied that there had been an overt act, and that theſe men were leagued in the conſpiracy which produced it, ſtill it would have remained a diſtinct and ſubſtantive queſtion whether their abſence from the overt act, and their having no immediate hand in it, did not diſcharge them from the conſtitutional guilt of levying war; for although leagued in the conſpiracy, and although there might have been an overt act, theſe men would have been innocent, if preſence at the overt act was neceſſary to make them guilty. The queſtion, then, of preſence or abſence, was a queſtion really preſented by the caſe of Bollman and Swartwout; it was one important to the deciſion of that caſe; and the court thinking it ſo, did conſider and decide it in direct oppoſition to the principle contended for on the other ſide.

Here, ſir, having the authority of the ſupreme court on my ſide, I might ſafely diſmiſs the gentleman's firſt point. But Mr. Randolph ſeems to think it doubtful whether you ought to be bound by that authority; even admitting it to be a regular judicial determination of this queſtion; for he made a very pathetic and affecting apoſtrophe to the ſituation in which you would be placed,

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if you differed from this opinion of the ſupreme court. I can diſcern nothing very tragical in your ſituation—a principle of law, ſolemnly adjudged by the ſupreme court, becomes, I apprehend, the law of the land; all the inferior courts of the United States are bound by it. To ſay that they are not bound by it, is to diſorganize the whole judiciary ſyſtem, to confound the diſtinctions and grades of the courts, to baniſh all certainty and ſtability from the law, and to deſtroy all uniformity of deciſion. If you, ſirs, ſitting as a circuit court, are not bound by the adjudications of the ſupreme court in this caſe, neither would any other circuit court in the union be bound by it; and the reſult might be and certainly would be, that what would be treaſon in one circuit, would not be treaſon in another; and a man might be hung in Pennſylvania for an act againſt the United States, in which he would be held perfectly innocent in Virginia; thus treaſon againſt the United States would ſtill be unſettled and fluctuating, and the object of the conſtitution in defining it, would be diſappointed and defeated. I truſt that we are not prepared to ruſh into this wide diſorder and confuſion; but that we ſhall temperately and regularly conform to the decrees of that parent court, of which this is a mere branch, until thoſe decrees ſhall be changed by the ſame high authority that created them.

But inſtead of repoſing on the authority of that deciſion, let us go further, and let us indulge the gentlemen with the enquiry whether that deciſion is in conformity with the conſtitution of the United States and the laws of England.

In interpreting the conſtitution let us apply to it the gentlemen's own principles—the rules of reaſon and of moral right.

That a law ſhould be ſo conſtrued as to advance the remedy and repreſs the miſchief, is not more a rule of common law than a principle of reaſon; and in reaſon, it applies to penal as well as remedial laws—ſo alſo, the common law maxim that a law, as well as a covenant, ſhould be ſo conſtrued as that its object may rather prevail than periſh, is one of the plaineſt dictates of common ſenſe. Apply theſe principles to the conſtitution. Gentlemen have ſaid that its object was to prevent the people from being harraſſed by arbitrary and conſtructive treaſon. But its object, I preſume, was not to declare that there was no ſuch crime. It certainly did not mean to encourage treaſon. It meant to recognize the exiſtence of the crime and to provide for its puniſhment. The ſame liberties of the people which required that the offence ſhould be defined, circumſcribed and limited, required alſo that it ſhould be certainly and deeply puniſhed; and the framers of the conſtitution, informed by the examples of Greece and Rome, and foreſeeing that the liberties of this republic might, one day or other, be ſeized by the daring ambition of ſome domeſtic uſurper, have given peculiar importance and ſolemnity to the crime by engrafting it upon the conſtitution. But they have

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done this in vain, if the conſtruction contended for on the other ſide is to prevail. If it requires actual preſence at the ſcene of the aſſemblage to involve a man in the guilt of treaſon, how eaſy will it be for the principal traitor to avow this guilt and eſcape puniſhment forever? He may ſecretly wander like a demon of darkneſs from one end of the continent to the other; he may pour poiſon into the ſimple and unſuſpecting minds of his countrymen; he may ſeduce them into a love of his perſon; may connect them in his plots; attach them to his glory; he may prepare the whole mechaniſm of the ſtupendous and deſtructive engine, and put it in motion; let the reſt be done by his agents; let him keep himſelf only from the ſcene of the aſſemblage or the immediate ſpot of battle, and he is innocent in law, while thoſe whom he has deluded, are to ſuffer the death of traitors. Is this reaſon? Is this moral right? Is this a mean of preventing treaſon? Or is it not rather, in truth, a direct invitation to it? Sir, it is obvious, that neither reaſon nor moral right require actual preſence at the overt act to conſtitute the guilt of treaſon; nor can a ſound mind or a ſound heart doubt one moment, between the comparative guilt of Aaron Burr (the prime mover of the whole miſchief) and of the poor men on Blannerhaſſet's iſland, who called themſelves Burr's men. There is a moral ſenſe much more unerring on queſtions of this ſort, than the frigid deductions of juriſts or philoſophers. The deciſion of the ſupreme court, ſir, is ſo far from being impeachable on the ground of reaſon and of moral right, that it ſtands ſupported by their moſt obvious and palpable dictates. Give to the conſtitution the conſtruction contended for on the other ſide, and you might as well expunge the crime from your criminal code; nay, you had better do it; for by this conſtruction you hold out to ambition and talents, the lure of impunity; while you looſe the vengeance of the law on the comparatively innocent.

Sir, the deciſion of the ſupreme court is equally ſupported by the law of England. Lord Coke, commenting on thoſe words of the ſtatute of Edward, which make our conſtitutional definition of treaſon, ſays, "if *many* conſpire to levy war, and *ſome* of them do levy the ſame according to the conſpiracy, this is high treaſon *in all*, for in treaſon all are principals and war is levied." 3. Inſt. 9. In page 16, he ſays, that although the ſtatute of Mary, which firſt made counterfeiting the privy ſignet or ſign manuel, high treaſon, ſays nothing of aiders or conſenters, "yet they are within the purview of this ſtatute, *for there be no acceſſories in high treaſon*." So alſo in page 21, he ſays, "In high treaſon there is no acceſſories but all be principals; and therefore, whatever act or conſent will make a man acceſſory to a felony before the act done, will make him a principal in high treaſon." In page 131 he ſays, "it is a ſure rule in law that *in alia proditione nullus potest esse accessorius, sed principalis solum modo*;" and

In illuſtration of the rule he puts this caſe; "if any man commit "high treaſon, and thereby becometh a traitor, if any other "man, knowing him to be a traitor, doth receive, comfort and "aid him, he is guilty of treaſon, for that there be no acceſſory "in high treaſon." The gentleman, indeed, admits, that according to Coke's authority, their client, although abſent, might be a principal in the act of treaſon. But Coke, they ſay, had no bowels; he was hard hearted and cruel; his thirſt for blood was ſo great that it miſled his underſtanding. Coke, however, does not ſtate the poſitions which I have read, on his own authority: on the contrary he cites in the margin the authorities on which he bottoms them, and moſt ancient and reſpectable authorities they are. But, to gratify the gentlemen, let us put Coke aſide: What will they ſay to Lord Hale? Did any fierce and ſavage paſſion agitate his breaſt, or darken the horizon of his underſtanding? O! no, ſir; no ſpot ever ſoiled the holy ermine of his office; mild, patient, benevolent; halcyon peace in his breaſt, with a mind beaming the effulgence of noon-day, and with a ſeraph's ſoul, he ſat upon the bench—like a deſcended God!—Yet this judge has laid down the doctrine for which I contend, in terms as diſtinct and emphatic as thoſe of lord Coke. Here Mr. Wirt read 1 Hale's Hiſt. Pleas of the Crown, 214, 339, 323, 328, 613—Hawkins and Foſter ſupport the ſame doctrines. 1 Hawk. ch. 17, ſec. 39. 2 Hawk. ch. 29, ſec. 2. Foſter 341.

I admit that judge Tucker has combated the doctrine, that in treaſon all are principals. I admit the truth of all the encomiums which the counſel for the defendant have pronounced on that gentleman. He has all the illumination of mind and all the virtues of heart, which they, with the view of enhancing the weight of his authority, have been pleaſed to aſcribe to him. What they have ſaid of him, from policy, I can ſay of him, from my heart, for I know it to be true. Yet give me leave, ſir, to examine, very briefly, his argument upon this ſubject. His object is to prove, that the poſition "in high treaſon all are principals," is not law in England. The mode which he adopts to prove his point is this: he collates all the authorities which have ſupported this doctrine, and tracing it up, with patient and laborious perſeverance, with the view, *petere fontes*, he finds the firſt ſpring in the reign of Henry the 6th. That caſe is reported in the year book 1. Henry 6, 5, and is very nearly as ſtated by Mr. Tucker from Stanford. It is ſimply the caſe of a man who broke a priſon and let out traitors. Stanford ſays it was adjudged petit treaſon; the year book merely ſays, that he was drawn and hanged, a ſentence which in thoſe days when the notions and puniſhment of treaſon, (notwithſtanding the ſtatute of Edward) remained ſtill unſettled, is certainly no very unequivocal proof that this crime was petty treaſon. Mr. Tucker thinks this caſe not correctly reported, and that the grounds of the judgment ſeem

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not well understood. It is to be recollected, however, that these year books, as we are told by Blackstone, serve as indices to the records in the several offices in Westminster; Coke, then, Hale, Hawkins, Foster and all those authors who have relied on this case as establishing the doctrine in question, guided by the marginal reference in the year book, had it in their power to examine the whole original record in the case, and thereby to understand the entire grounds on which that case proceeded. From their great industry and their prodigious research, there can be no doubt that they did so, and that they have therefore stated the principles of this case correctly. Chief Justice Hussey, in the 7 Henry the 7th, 10, about sixty years after the first decision, and consequently with much better means of understanding its nature, extent and boundaries than we can possess, refers to it as asserting the doctrine, that in treason there are no accessories, but all are principals. Nor is it to be believed that this doctrine originated in the reign of Henry the 6th. The earliest reported case indeed which has come down to us, occurred in the first year of that reign. There is nothing, however, in the manner of the report which marks it as a case of the first impression; on the contrary the sentence seems to have been a thing of course, and the judges of that day appear, in the language of Blackstone, to be merely pronouncing the immemorial custom of the land. The learned and laborious Hawkins, speaking, no doubt, after the most profound and extensive research, declares, in a passage before cited, that it seems to have been *never doubted* that in treason all are principals. And most certainly, from a very early period in the fifteenth century to the present day, that doctrine has not been questioned in England. After such a lapse of years and centuries, after such full and perfect consent and concurrence among all the judges and all the writers of England, it would be bold in us to say, that this is not the law of England; and after all, the learned judge Tucker rests the fabric of his reasoning on the ground of the imperfection of the first report; an obstacle which, however insuperable to him, was easily to be surmounted by those great men who had access to the original record; and who having that access, have affirmed that the case justified the doctrine which they advance. Let me conclude my remarks on Judge Tucker by observing, that however deeply and sincerely I revere him, yet certainly when the question is "what is the law of England," it cannot be considered as disrespectful to our learned and virtuous countryman to prefer the authority of such men as Coke, Hale, Hawkins and Foster, to his. It is on the authority of those distinguished men I shall rest my conclusion, that the opinion of the supreme court of the United States is in harmony with the English law.

But we are told by Mr. Wickham, that all this is elementary and theoretic: that there are no practical decisions worthy of re-

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ſpect which maintain the principle. Suppoſe this were ſo, would any judge require higher authority for the law of England than ſuch names as thoſe which I have juſt mentioned; would a caſe from the year books, decided by Huſſey or Rian, or a caſe from the State Trials, decided by Brumley, Jeffries, or even Holt himſelf, be higher authority than Coke and Hale, Hawkins and Foſter? Certainly not. The three caſes, however, from the year books, in the reigns of Henry the 6th and 7th, on which judge Tucker comments, are adjudged caſes which avow the principle. In addition to theſe, Coke, in the margin of the paſſages before read, cites ſeveral caſes in the reign of Edward the 3d, which I have not had time to examine, but which it is preſumable from his learning and accuracy, are properly cited in ſupport of this doctrine.

Mr. Wickham ſays, that the books ſhew only two caſes of acceſſories before the fact having been adjudged guilty as principals: but he admits that there are ſeveral caſes of acceſſories after the fact being ſo adjudged; and he ſeems to be apprehenſive that we ſhall reaſon from theſe later caſes to the caſe of an acceſſory before the fact. I do not know that it is important, but the truth is that the gentleman, unintentionally, no doubt, has inverted the order of guilt in this caſe; *in reaſon*, the acceſſory before the fact, he who procures the act, or aſſiſts in bringing it about, is certainly much more guilty than the acceſſory after the fact, who having no previous knowledge of the fact, much leſs any agency or inſtrumentality in bringing it about, merely receives and comforts the man who has done it. This line of diſcrimination, ſo ſtrongly drawn by *reaſon*, was long reſpected by *the law* of England, and ſo far were acceſſories after the fact from occupying the worſt ground, that while it was *never* doubted that acceſſories before the fact were guilty as principals, it was *very long* doubted whether acceſſories after the fact were ſo guilty. This we are expreſsly told by Hawkins:—2 Hawk. ch. 29, § 3. I think, however, I ſhall ſhew by and bye that theſe acceſſorial doctrines have nothing to do with the caſe at bar.

The gentleman next read the caſe of Sir Nicholas Throckmorton's ſufferings, as they are collected into a Gorgon's head by Judge Tucker. We do not rely upon the authority of that caſe; and the gentleman, by reading it, has proved only what we readily admit, that Brumley was a judicial tyrant, and that Throckmorton was cruelly and barbarouſly oppreſſed. I can ſee but two motives which the gentleman could have had in view in reading this caſe with a countenance and cadence of ſuch peculiar pathos; the firſt contains an implication not very reſpectful to the court: that it was neceſſary to hold up to this court, *in terrorem*, the immortal infamy of Brumley's name: the ſecond to excite our ſympathies, under the hope that when once ſet afloat, for the want of ſome other living object they might attach themſelves to

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his client. It was with the ſame views, I preſume, that the gentleman gave us the pathetic and affecting ſtory of the Lady Lyle as it is touched by the chaſte and delicate pencil of Hume. It was with the ſame views, alſo, that he recited from the ſame author the deep, perfidious, and bloody horrors of a Kirk and a Jeffries. Senſible that there was nothing in this trial or in the virtues of his client to intereſt us, he borrowed the ſufferings and the virtues of a Throckmorton, and a Lady Lyle, to ſet our hearts a bleeding; thinking that our pity thus excited, would be generouſly transferred, aſſigned and ſet over, by way of indorſement, to his client. I congratulate the gentleman upon the ingenuity of the device: the only defect in it is the great hazard, that while we are running parallels between his client and the *dramatis perſonæ* introduced from Hume, we ſhall find among them an apter prototype for him than in the virtuous and manly Throckmorton, or the ſimple, innocent and humane Lady Lyle.

But we are told that, however, the caſe may have been *prior* to the revolution of 1688, *ſince that period* they have leaned the other way, and go to ſhew that acceſſorial acts will not make a principal in treaſon. How is this concluſion obtained: by any adjudged caſe? No. By any *obiter dictum* of a judge? No.—How then does the gentleman ſupport the idea of this change in the Engliſh law? He infers it from the impunity of ſome of thoſe who fought the Pretender's battles or aided him in his flight. This is a new way of ſettling legal principles. Sir, this was the mere policy of the houſe of Hanover. The pretenſions of the Stuarts had divided the Britiſh nation. Their adherents were many and zealous. Their pretenſions were cruſhed in battle. Two courſes were, then, open to the reigning monarch; either by clemency and forbearance to aſſuage the animoſity of his enemies, and prop and brace his throne with the affections of his people; or to purſue his enemies with vengeance; to drive them to deſperation; to diſguſt his friends by needleſs and wanton cruelty; and to unſettle and float his throne in the blood of his ſubjects. He choſe the former courſe; and from this politic or magnanimous forbearance, it is argued, the law of treaſon was changed. To prevent this inference, according to the reaſoning of the gentleman, it was neceſſary to have beheaded or hung up every human being who even aided the unfortunate Charles in his flight. Mr. Wickham has mentioned Miſs Mc'Donald—and he would have had the monarch to have hazarded the indignation and revolt of a generous people, by ſeizing that beautiful and romantic enthuſiaſt, Flora Mc'Donald, and dragging her from her native mountains in the iſle of Sky, to a priſon, and to death. We are told, indeed, by Doctor Johnſon, in his tour to the Hebrides, that this ſtep, impolitic as it was, nevertheleſs was hazarded; hazarded but partially though; ſhe was carried to London; but, together with Mc'Cleod who aided in the ſame flight, ſhe was

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dismissed, on the pretext of the want of evidence. But certainly a forbearance to punish under an existing law, is no argument of the change of that law.

The gentleman unable to sustain either by *adjudication* or *dictum* this novel idea that the law of treason is changed since the revolution of 1688, proceeds still farther in the attempt to support it by inference, and next infers from the special form of the indictment in Foster 3—6, that presence at the overt act is indispensible to the treason of levying war. That indictment lays two overt acts of the treason; first the general overt act of assembling with an armed multitude and levying war; secondly the entering and taking the town and Castle of Carlisle, from the special nature of which last overt act the gentleman deduces the conclusion, that the first was not sufficient; and that the last must necessarily have been proven to sustain the indictment; but is it any where decided that this second overt act was necessary? On the contrary in Lord Balmerino's case (10 St. Tr. 605,) also cited by Mr. Wickham, where the indictment was precisely that in Foster, it is argued by the counsel for the Crown and admitted by the Court, in effect, that the proof of the second overt act was unnecessary; that it was immaterial whether the evidence shewen him to have entered and taken the town of Carlisle or not; that it would be sufficient to introduce evidence to the first overt act; the general overt act of levying war. Hence it is obvious that the specification of entering and taking the town of Carlisle was unnecessary and superfluous; therefore no inference can be fairly drawn from the insertion of it in the indictment. But it is strange that the gentleman should attempt to draw from the mere form of this indictment in Foster the conclusion that the law of England was changed, and that an accessorial act would no longer make a principal in treason, when Foster himself expressly lays down the reverse of this principle, in the passage which I have before cited, and declares that *all* who are leagued in the conspiracy to levy war, are guilty of the levying whether present or absent—whether the war was levied by *a few* or *by all*. The same remark applies equally to the inference attempted to be drawn by Mr. Wickham from the case of Deacon and Wedderburne, reported by the same author.

Other remarks of the gentleman under this head as to accessories being the mere creatures of the common law, and the common law not existing in this country, will be more properly noticed under another head.

I hope it may now be justly considered as proven, that, whether we look to the laws of England, or to the constitution of the U. States, as expounded by the rules of reason and of moral right, or as expounded by the Supreme Court of the United States, the prisoner's presence on Blannerhasset's island at the time of the overt act was not necessary to the constitution of his guilt;

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and therefore that there is nothing in the gentleman's first objection to prohibit the introduction of farther proof.

But if, after all, this Court should be of opinion that the prisoner's presence on the island was necessary to make this an overt act of war, is not this a question for the Jury? The question whether there has been an overt act of war, or not is a mixed question of fact and law: it is the question made by the issue in this case; it is the very question which the jury are sworn to decide. If, for this objection that presence is a material ingredient in the composition of the act, the court exclude all farther evidence, will this not amount to saying that we have not proved the overt act to the satisfaction of *the Court;* that the evidence we have introduced, and all we propose to introduce, will be insufficient to satisfy *the Court* of the overt act? And will not *the Court*, hereby, take the place of the Jury; foreſtall them in the very question which they are sworn to try, and snatch it from them by a *coupe de maine?* Gentlemen, indeed, try to give this question a legal attitude by contending that other evidence will be irrelevant until the fact of presence shall be proven; but, then, in order to decide this question in the affirmative, the Court must assume the function of a Jury, and say that the overt act is not and will not be sufficiently proved without it. But suppose this question as to the necessity of presence, a question of pure law; still it would be a question which the Jury would have a right to decide; since the law as well as the fact is completly within their power. The Court may, indeed, after all the evidence shall be given instruct the Jury as to the law; they may instruct them as to what will constitute an overt act of levying war. But nothing more clearly shews the sovereign power and controul of the Jury both over the law and fact than this; that, even, after such instruction of the Court, the Jury may if they choose decide the case in opposition to such instruction. I do not say that they will do it; or that they ought to do it: but I say that they may do it if their conscience shall so direct; and I say this by the way of shewing the paramount power of the Jury, over the very question now sought to be withdrawn from them and given to the Court. I conclude this point with assuming it as proved, that actual presence was not necessary to make the prisoner a principal in the treason; and if the Court shall think it was, that this is a question which cannot be taken from the Jury.

This objection therefore furnishes no legal bar to the introduction of our evidence.

I proceed to examine the gentleman's second point. It is this; no farther evidence is admissible under this indictment, because the fact must be proved as laid; and as the indictment charges the prisoner with levying war on the island where it is proven he was not, there is an end of the case; no farther evidence can be let in under this indictment.

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Under this head the gentleman began by commenting on the omiſſion of the word *public* in the indictment; "why did not the attorney for the United States charge the priſoner with levying *public war*, inſtead of merely charging him with levying war; why was the word *public* left out?" and then with a countenance inſinuating even more than his expreſſion, he aſked, "whether the word *public* was omitted to render the indictment more palatable to the Grand Jury?"

The anſwer is a very ſimple one; the indictment was drawn from an authentic copy of the indictment of Fries; it is an exact tranſcript of that indictment, with a mere change of names. There the word *public* is not found. Nor is it neceſſary that it ſhould there be found. The indictment purſues the Conſtitution and act of Congreſs, and tranſfers from thoſe inſtruments *verbatim* the definition of treaſon. The conſtitution does not ſay that treaſon ſhall conſiſt in levying *public* war againſt the U. States; but ſimply in levying war againſt them. So alſo is the act of Congreſs. An indictment purſuing that definition in expreſs terms is certainly ſufficient to all intents and purpoſes. The word *public* is ſurely of no importance. The gentleman indeed, on the ſecond day of his argument admitted that it was of no importance; and acknowledged his error in ſaying, that this was the firſt indictment which had omitted it. He acknowledged that in the ſecond indictment of Fries it was omitted. It was natural to have expected that the gentleman, on this diſcovery, would have retracted the ungenerous inſinuation that the word had been intentionally omitted in order to render the indictment more palatable to the Grand Jury. He thought proper, however, to let the inſinuation remain where it was. Be it ſo. The attorney has the conſolation that his purity is to be eſtimated by his country, and not by the priſoner or his counſel.

But it ſeems that the indictment charges the act to have been done with divers perſons unknown; and we attempt to prove that it was done with perſons who were known. This is an objection which I had ſuppoſed the manlineſs of the gentleman's underſtanding would have rejected. He thought proper, however, in the dearth of other materials to urge it with his wonted ſpirit and to attempt to ſupport it by authorities. He does not pretend, indeed that any author, elementary or practical, has ever aſſerted that this is *neceſſary*. He does not pretend that any Judge has ever declared it ſo. But he infers it from the ſpecification of other names in ſeveral indictments, during the protectorſhip of Oliver Cromwell. He cites the caſes of Hewitt and Mordaunt. I have examined thoſe caſes. They are not indictments for levying war; they charge the priſoners with delivering military commiſſions to ſeveral perſons, who are named, in behalf of Charles the II. Their offence, from the na-

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ture of it, required the naming of Charles the II. and those to whom commissions were delivered. But in the treason of levying war the most usual form is to charge the war to have been levied with persons unknown, and that in cases where the persons certainly were known. Thus Lord Balmerino and the Earls of Kilmarnock and Cromartie were in arms together on the field of Culloden. They were taken prisoners together; they were severally indicted on the same day for the same offence; arraigned on the same day; and although, therefore, it is clear that they were all known to the attorney for the Crown, yet each indictment charges them to have levied war with persons unknown. The gentleman says it is not enough to charge the prisoner with levying war; but that in the overt act we should have set out the particular acts which were done by the prisoner, and the evidence by which we mean to charge him. I deny, Sir, that this is law. It is a question strictly legal, and therefore is to be decided by authority. East, 1 vol. p. 116. after stating that in every indictment for high treason, the particular species of treason must be charged *in the very terms* of the statute of Edward as the substantial offence, adds that "then some overt act must be laid as the means made use of to effectuate the traitorous purpose." He proceeds: "The overt acts so laid, are, in truth, the charge to which the prisoner must apply his defence. And therefore it is in no case sufficient to alledge that the prisoner compassed the King's death, or that he levied war against him, or adhered to his enemies; for upon a charge so general and indefinite he cannot know what acts he is to defend. The particular acts of compassing and adherence must be set forth; and in the other instance" (that of levying war) "it must be alledged *that he assembled with a multitude armed and arrayed in a warlike manner and levied war;*" and thus in our indictment it is alledged. East proceeds, "The indictments against Damaree and Purchase for pulling down meeting houses charged that they with a multitude, to the number of 500, to the Jury unknown, armed and arrayed in a warlike manner with clubs and staves, and other arms offensive and defensive, levied war against the queen. No exception was taken to the indictment by Damaree's counsel; but on behalf of Purchase it was objected that there ought to have been an overt act laid of the treason; because there being such a variety of facts which amount to levying war, if the particular facts intended to be brought forward against the prisoner were not alledged, he could not know how to make his defence. *But it was resolved by all the Judges upon conference that the indictment was good; and that levying war being an overt act of itself no other overt act need be alledged.*" The indictments in those cases are substantially stated by Foster 213-14 and the indictments themselves will be found in 8 St. Tr. 218-19. Now in those cases the acts which these

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men did and which constituted their crime was pulling down meeting houses; but in the indictment there is not a word of meeting houses or any other houses; the overt act is, 'that with a multitude armed and arrayed in a warlike manner they levied war against the queen:' and the Court upon solemn argument, and after a conference decide unanimously that the indictment is sufficient, and let in the particular evidence under it. And as to the overt act's stating *the evidence* on which we mean to rely, it is expressly declared by East 121, on the authority of a variety of cases which he cites, that "it is not necessary that the whole detail of the evidence should be set out." In direct confirmation of this doctrine are Foster 194. 200. 1. H. H. P. C. 122. 4. St. Tr. 722 Lowick's case, and 4 St. Tr. 696-7. Rookwood's case.

Mr. Wickham does not say that this minute specification, on which he insists, has ever been adjudged necessary, but he infers it from the form of indictments in several cases which he has cited. They do not support him. In the cases of Balmerino, Cromartie and Kilmarnock, it is true, as I have before stated, that those indictments lay as one overt act the entering and taking possession of the town and castle of Carlisle; but in the first named case, this specification is declared to be unnecessary, and it is said that the general overt act of levying war with an armed multitude, would be sufficient to let in the evidence. These cases, therefore, instead of supporting Mr. Wickham, disprove the doctrine for which he contends. He still insists, however, that wherever it was intended to criminate a man by accessorial acts, the particular acts which he does, must be set out; and to prove this, he again cites the indictments in the cases of Hewitt and Mordaunt before mentioned, and of Cornish. I answer first, that no legal principle can be safely inferred from the mere forms of the indictments in the State Trials. They have been continually shifting and changing. Thus the case cited by Mr. Randolph from the first State Trials, exhibits an indictment which is really a legal curiosity: the treason there charged is compassing the king's death, and the indictment is as much in detail as Pope's history of the parish clerk. But the inference that this detail is necessary, is refuted by express authority; 1 East 124-5 on various authorities informs us, that it is sufficient in that species of treason (compassing the king's death), to lay as the overt act, that A and B met, and proposed the king's death. Besides, what becomes of this inference from an indictment so much in detail (at a period when, as Mr. Randolph says, not a ray of judicial light had touched the English horizon) when in modern times of greater light, the indictments exhibit nothing of this detail. An inference from these modern indictments, that this detail is not necessary, is certainly as fair as the inference from the ancient indictments that it is necessary. Thus your infe-

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rences are in conflict, and deſtroy each other. I refer you to the caſe of Lowick and Rockwood, firſt cited for another purpoſe, to ſhew that this minute and circumſtantial form of indictment is exploded. I refer you alſo to the Apprentices caſe, 2 St. Trials, 531, to ſhew that under the general indictment for levying war, they go, in England, into the circumſtances of the caſe at large. And ſecondly, I anſwer to Mr. Wickham's caſes, that neither of them is for levying war. Hewitt and Mordaunt were indicted for giving commiſſions to officers of the exiled king; and this is not charged as acceſſorial to any greater act, as levying war.—The indictments are reſtricted to the ſingle fact which I have ſtated, and contemplate no ulterior act. How then can it be ſaid that thoſe acts are of an acceſſorial nature, when the ſole guilt in the caſe is conſummated by the acts themſelves which are charged, without borrowing any portion of that guilt from any ſubſequent occurrence? The other caſe, that of Corniſh, charges him with promiſing aſſiſtance to the Duke of Monmouth; and here his indictment ſtops: it does not look to any thing elſe (as Monmouth's invaſion) to compleat the priſoner's guilt. His guilt is the promiſe; not the levying of war. There is nothing therefore in theſe caſes to warrant the principle, that when a man is attempted to be implicated by acceſſorial acts in the treaſon of levying war, thoſe acceſſorial acts muſt be detailed. There is nothing in them to prove that the charge of levying war with an armed multitude is inſufficient; on the contrary, in the only caſe in which this point came directly in queſtion before the court, it was unanimouſly and ſolemnly declared to be ſufficient.

Is it not ſufficient in reaſon as well as in law? Is it to be believed that A. Burr is not ſufficiently apprized by this indictment, of the charge againſt him to prepare for his defence? Has he not prepared, ſir; Look at the fact. He himſelf ſtates that he has ſummoned twenty or thirty witneſſes.

Let us not then, ſir, by theſe captious exceptions, unſupported either by law or reaſon, permit ourſelves to be turned aſide from the enquiry before us. Reaſon and law concur in ſhewing that there is nothing in Mr. Wickham's ſecond point to obſtruct the evidence.

I proceed, Sirs, to the gentleman's third point, in which he ſays he cannot poſſibly fail: it is this; "becauſe if the priſoner be a principal in the treaſon at all, he is a principal in the ſecond degree, and his guilt being of that kind which is termed derivative, no farther *parole* evidence can be let in to charge him, until we ſhew a record of the conviction of the principals in the firſt degree." By this poſition the gentleman is underſtood to advance in other terms the common law doctrine, that when a man is rendered a principal in treaſon by acts which would make him an acceſſory in felony, he cannot be tried before the principal in

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the first degree. I believe this to be, indeed, the doctrine of the common law. But it has no manner of application to this case;

1st. Because it is the mere creature of the common law of England.

2dly. Because if the common law of England be our law, this position assumes what is denied, that the conduct of the prisoner in this case is of an accessorial nature.

1. Because this position is the mere creature of the common law. Neither our constitution nor act of congress distinguish between principals in the first and second degree; all who levy war against the United States, whether present or absent, all who are leagued in the conspiracy, whether on the spot of assemblage, or performing some minute and inconsiderable part in it, a thousand miles from the scene of action, incur equally the sentence of the law; they are all equally traitors. This scale, therefore, which graduates the guilt of the offenders and establishes the order of their respective trials, if it ever existed here, is compleatly abrogated by the highest authorities in this country:—The convention which formed the constitution and defined treason; congress, which legislated upon that definition, and the supreme judiciary of the country expounding the constitution and the law, have united in its abrogation. But let us for a moment put the convention, congress and judiciary aside, and examine how the case will stand: still this scale of moral guilt which Mr. Wickham has given us, is *the creature of the common law*, but he himself, in another branch of his argument, has emphatically told us, that the common law does not exist in this country; has stated that the creature presupposes the creator; and that where the creator does not exist, the creature cannot. The common law, then, being the creator of the rule which Mr. Wickham has given us, and that common law not existing in this country, neither can the rule, which is the mere creature of it, exist in this country. So that the gentleman has himself furnished the argument which refutes this infallible point of his, on which he has so much relied. But to try his position to its utmost extent, let us not only put aside the constitution, act of Congress, and decision of the supreme court, but let us admit that the common law does exist here; still, before the principle could apply, it would remain to be proven that the conduct of the prisoner in this case has been accessorial:—or in other words, to give it its broadest footing, that his acts in relation to this treason are of such a nature as would make him an accessory in felony.

Being now on the general doctrine of principal and accessory, as they exist at common law, I will follow the gentleman through the whole range of his remarks on the subject, and notice some which he advanced under his first head. He said that accessories are the mere creature of the common law; hence, said he, when

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a ſtatute is made in affirmance of common law or in aid of it, all common law conſequences follow; as when a ſtatute is merely declaratory of a common law felony, whether the ſtatute ſays any thing about acceſſories or not, they are embraced by it, becauſe they exiſted in the offence at common law: but where the ſtatute creates a new felony, not known at common law, as the ſtatute of Henry 8, making piracy a felony, acceſſories are not comprehended by it. Upon this ground-work he has built the argument that as *we* have no common law, the conſtitution and act of Congreſs which define treaſon, ſtand alone; and as they merely embrace thoſe who actually levy war and are therefore the principals, thoſe who procure or are otherwiſe acceſſory to it, are not comprehended: and hence he concludes that the priſoner who merely brought about this treaſon by procurement, is not within the conſtitution and act of Congreſs. This argument is perfectly characteriſtic of the ingenuity and ſubtlety of the mind which produced it; but let us try the ſtrength of this curiouſly woven web. The firſt remarkable feature about it is, that the whole of it is an emanation of that common law, upon whoſe non-exiſtence in this country the gentleman founds his concluſions. His premiſes are laid in the common law; and he derives from the common law of interpreting the Britiſh ſtatutes, a principle which he applies analogically to the interpretation of our conſtitution; and which gives him his reſult, *only* upon the *poſtulatum* that there is no common law in the United States. But let us wave the objection and examine his premiſes themſelves.

Firſt, is it true that a ſtatute made in affirmance of common law or in aid of it, carries along all common law conſequences? The book referred to by the gentleman, does not prove it: 10 St. Tr. 436, which he cited as authority without producing it, is merely the argument of Hume Campbell, one of the counſel in the cauſe, and againſt whom that cauſe was determined; I believe, ſir, it is not uſual for a gentleman citing an abſent author in ſupport of his doctrine to refer to the argument of counſel and the opinion of the court. But admitting that the *dictum* of Hume Campbell were authority, *he* does not ſtate the doctrine which he is cited to ſupport. He ſays merely that "if a ſtatute ſpeak of *matters* known at common law, it muſt, *as to that matter*, be conſtrued and extended according to the common law." In ſupport of his poſition, Hume Campbell cites Coke Lit. 381, Hobart 93 and 6 mod. 148. Of theſe three authorities Mr. Wickham ſelected Hobart as auxiliary to the State Trials. Hobart is an ancient book not frequently found in modern libraries: he is not in mine; and from the abrupt manner in which this motion has been ſtarted upon us, and the extent of legal ground which it covers, I have not had time to hunt for that author through the town: whether he ſupports even Hume Campbell, I am therefore unable to ſay, I ſhall ſuggeſt a reaſon preſently to render it probable that he does not.

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The other two authorities to which he refers do not support him. Coke Littleton has nothing like it: he gives, indeed, in the page referred to, three rules for the construction of statutes, as 1st. That one part of it is to be expounded by another: 2d. That the words of an act of parliament must be taken in a lawful and rightful sense, and thirdly, *that construction must be made of a statute in suppression of the mischief and in advancement of the remedy, et qui hæret in litera hæret in cortice.* This is all he says upon the subject; and in all this we have nothing which resembles Mr. Hume Campbell's position. The other authority to which he refers, 6 mod. 143, it is remarkable, is also the argument of counsel, sergeant Pengelly; this learned sergeant asserts, indeed, a principle which I believe to be true; but it is much more restricted and materially variant from that of Hume Campbell, and of course still more variant from that of Mr. Wickham: speaking of the phrase *arrest of judgment* which had been used in a statute of William the 3d, as being a phrase known to the common law, he says, "when an act of parliament makes use of *such a term* generally, it shall receive the same sense that the common law takes it in and no other;" in support of which Pengelly cites Hobart 97, 98, the very author and page cited by Hume Campbell to support his doctrine: hence I think it probable that Hobart stops at the limits given by serjeant Pengelly. The result of the investigation is, that Mr. Wickham's broad principle, that a statute made in aid or affirmance of the common law carries with it *all common law consequences*, is reduced to this: that when a statute uses a common law *phrase*, *that phrase* shall receive the same sense in the statute which it had at common law; a principle to which he is very welcome, but which will do him no manner of good—so that down comes one of the pillars which supported this air-drawn argument.

Let us examine another: "if a new felony be created by statute, no common law consequences follow:" In support of this doctrine the gentleman refers to 1 Hale's P. C. 354-5, and the authority, at first view, seems to countenance his doctrine; it requires, however, but to be more closely and extensively examined to perceive that the passage, in the light in which Mr. Wickham understands it, is not law: the passage is this, "If a man be attaint of piracy before commissioners of Oyer and Terminer grounded upon the statute of 28 H. 8, chap. 15, by indictment and verdict of twelve men according to the course of the common law, he forfeits his lands and goods by the statute of 28 H. 8, chap. 15, but this works no corruption of blood, because it is an offence whereof the common law takes no notice, and though it be enacted they shall suffer and forfeit as in case of felony, yet it alters not the offence." In support of this Hale cites Co. P. C. cap. 49, page 112:—but he adds, "*vide tamen contra*" Co. Litt. sec. 745, p. 391. The passage in the latter

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author is thus: "There is also a felony punishable by the civil law because it is done upon the high sea as piracy, robbery, or murder, whereof the common law did take no notice, because it could not be tried by twelve men. If this piracy be tried before the Lord Admiral in the Court of the Admiralty according to the civil law, and the delinquent there attainted, yet shall it work no corruption of blood nor forfeiture of his lands; *otherwise it is, if he be attainted before commissioners by force of the statute of* 28 H. 8." Hence it appears that the common law consequence of attainder depended on the tribunal, the form of trial, and the law under which the pirate was tried; since if tried before commissioners *under the statute*, the common law consequence of attainder did follow, although the felony did not exist at common law, but was newly created by statute. Hale himself in page 355, qualifies the generality of his expressions in the passage just read. In the paragraph immediately succeeding it, he takes up the first branch of the position just read from Coke: "if a man be attainted *before the admiral* of treason or felony committed upon the sea, &c. *according to the course of the civil law*, yet it works no corruption of blood, &c. the manner of the trial being according to the course of the civil law, &c." He proceeds—"If there be an attainder of treason or felony done upon the sea, *upon this statute of* 28*th H.* 8, *according to the course of the common law, it seems that the judgment thereupon works corruption of blood; because the commission itself is under the great seal warranted by act of parliament, and the trial is according to the course of the common law, &c.* " and with this agrees Co. Litt. sec. 745, page 391, nay, I think farther, that if *the indictment of piracy* before such commissioners, upon the statute of 28 H. 8, be formed *as* an indictment at common law, to wit, *vi et armis and felonice, &c.* that he might be thereupon attainted and the blood corrupted." Hence in the opinion of Hale himself, it depended upon the form of the indictment and the tribunal, whether the common law consequence of attainder, would follow a conviction for piracy on this statute. The result is, that although statute do create a felony unknown to the common law, yet common law consequences may follow a conviction upon it; which is precisely the reverse of the position contended for by Mr. Wickham. But if this point were conceded to the gentleman as relates to *attainder*, it would not avail him; because in order to extract from the common law the rule which he applies analogically to the construction of our constitution and act of Congress, he must shew that when a statute creates an offence, and is silent as to accessories, no accessories are embraced by the statute. It will perplex the gentleman to shew this; at exents the research necessary to it would require more time than they have allowed us, to discover the authorities which would support the position. The doctrine upon this subject so far as I have been able to trace it, is this; that

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when an act of parliament makes an offence and says nothing of accessories, they are nevertheless embraced; although it is true that the peculiar wording of a statute may prevent that consequence. 1 Hale's P. C. 613. "It remains therefore that the business of this title of principal and accessory refers only to felonies whether by the common law, or by act of parliament. As to felonies by act of parliament, regularly if an act of parliament enacts an offence, *though it mentions nothing of accessories before or after*, yet virtually and consequentially those that counsel or command the offence, are accessories *before*, and those that knowingly receive the offender are accessories *after*:—Id. 614. "Though generally an act of parliament *creating a felony* renders *consequentially* accessories before and after within the same penalty, yet the special penning of the act of parliament in such cases sometimes varies the case." Hence it is, that is from the special penning, that the statute of piracy extends only to principals, 2 Hale's P. C. 18.—Hale 632, "As in other felonies so in this, there are or may be accessories before and after; for though this be a felony by act of parliament *that speaks only of those that commit the offence*, yet consequentially and incidentally accessories before and after are included, *and so in every new statute making a felony* without speaking of accessories *before or after*." The statute of 5, H. 4, cap. 4, was a statute to prohibit the multiplication of gold or silver, that is alchymy, (vid. Wilson's edition of Hale's P. C. 644 and note *a*) This was an offence not existing in any shape at common law, and in truth, never existing any where but in imagination. Hale in the page just referred to, speaking of this statute, says, "And *altho' the statute mentions not accessories before or after*, yet this statute making the fact felony, doth *consequentially* subject accessories *before and after* to the penalty; though this be made a *quare* by Dyer 88 in Eden's case, *yet it seems now settled according to the opinion of my Lord Coke P. C. cap.* 20, *that there may be accessories before and after*" Here the authority is conclusive of the point, that although a statute create a new felony unknown to the common law, and although it says nothing about accessories they are nevertheless comprehended as a necessary consequence or incident. I refer you also, sir, to page 704 of the same author, where the doctrine is refuted; and where on the authority of Sir Edward Coke, it is carried so far as to state, that when a statute makes a felony and expressly comprehends accessories before the fact, being silent as to those after it, yet, notwithstanding the maxim *expressum facit cessare tacitum*, accessories after are virtually included. From this examination two conclusions are fairly deducible.

First, that when a statute creates a new felony unknown to the common law, although such statute says nothing about accesso-

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ries to that felony, yet they exist and are punishable under the act.

Secondly. That accessories are *not* the mere creatures of the common law; they may derive their existence from a statute *solely*, and that by mere implication under that statute. What, then, becomes of the gentleman's nice tissue, his web so delicately put together and waving and glittering in the sun? It breaks and vanishes at the touch.

Since then accessories are not the creatures merely and solely of the common law, it makes no difference whether the common law exists here or not: accessories may nevertheless exist.

Since a statute creating an offence, impliedly embraces accessories, not by the operation of common law, but by the reason and nature of things; an American statute may impliedly embrace accessories since whatever we may think of the existence of the common law in this country, no American, I hope, will doubt that reason and its deductions may exist here.

But let us admit for the sake of argument what is certainly disproved: that accessories are the mere creatures of the common law; and let us also admit that our constitution and act of Congress do not embrace accessories: is it so very clear that we have no right to resort to the common law *in this case*, to implicate accessorial traitors. I do not, myself, think this enquiry necessary: but it may appear so to you; and I would leave no subject untouched which the Court may consider as involved in the debate.

It would not be very bold in me, Sir, to argue for the existence of the common law *en masse* in this country. Do not let it for a moment be understood that I meant to argue for this; I say only that it would not be very bold in me to do this; and I say so because a majority of the federal judges, so far as their opinions have been made known, have held that opinion. In Worrel's case cited from Dallas, the Court was divided; Judge Chase thought the common law in force, Judge Peters thought otherwise. In a subsequent case, and that a criminal one, I mean the case of Williams, Judge Ellsworth held that the whole of the common law was in full force, and even that unnatural and absurd idea that a man is forever the subject of that country, in which it is the pleasure of his parents that he shall be born. Mr. Tucker informs us that judge Washington was also of opinion that the common law of England is in force here. These are all the opinions of which I have heard. Having thus the majority of the federal Judges in favour of the opinion that the common law of England is in force here, I repeat that it would not be very bold in me standing before a Federal Court, to insist on the full operation of the common law together with all its consequences, and its imputed offspring, accessories among the rest. But I will not avail myself of this "vantage ground." My own opinion is a different one. I take the principle with

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much greater reſtriction, and on this head ſubmit theſe reflections to the conſideration of the court.

When a technical term is borrowed from any art or ſcience, we look to that art or ſcience to aſcertain its import and ſignification. This is a rule of reaſon. It is the foundation of the principle cited by ſerjeant Pangelly from Hobart, that when a ſtatute adopts a *common law term*, you take that *term* in its common law meaning. It is the foundation, too, of a paragraph in one of the moſt luminous and maſterly ſtate papers that ever fell from the pen of man: I mean the celebrated report of the Virginia committee in 1799, 1800, from which I beg leave to read a ſhort extract relative to our preſent enquiry—"Deeply impreſſed with theſe opinions, the general aſſembly of Virginia, inſtruct the ſenators and requeſt the repreſentatives from this ſtate in Congreſs to uſe their beſt efforts, to oppoſe the paſſing of any law founded on or recognizing the principle lately advanced, that the common law of England is in force under the government of the United States, excepting from ſuch oppoſition, ſuch particular parts of the common law as may have a ſanction from the Conſtitution, ſo far as they are unneceſſarily comprehended in the technical phraſes which expreſs the powers delegated to the government; and excepting alſo ſuch other parts thereof as may be adopted by Congreſs as neceſſary and proper for carrying into execution the power expreſsly delegated."—Here we find the recognition of the principle which common law phraſes *takes* in the common law ſenſe. Upon the ſame ground Judge Iredell in the caſe of Fries ſtates in effect that the conſtitutional terms of *our* definition of treaſon being borrowed from the Britiſh ſtatute, the framers of our conſtitution intended to adopt the meaning of thoſe terms as expounded in the parent country.

Let us apply theſe principles. Whence do we derive the particular treaſon of levying war? From the Britiſh ſtatute *immediately*; but *originally* from the common law. Sir Edward Coke in his third inſtitute gives us a commentary on the ſtatute of Edward III. He divides it into members and expounds each of them as he goes along—when he comes to the words of the ſtatute "*ou ſi hom eleva guerre encounter notre ſeignoir le roy.*" If a man levy war againſt our Lord the King, he ſays "this was high treaſon *by the common law*"—altho' then the *words* of our definition be derived immediately from the ſtatute, yet as *the ſpecies of treaſon levying war*, is tranſplanted from the common law, have we not a right to go to the fountain head, and aſcertain there how much ground is covered; what was the nature of the treaſon, what its extent and limits? I do not ſpeak of common law treaſons at large, but this particular treaſon of levying war: if we have a right to go to the common law for this purpoſe, we ſhall diſcover that it comprehended all who were leagued in

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the general conſpiracy, whether they themſelves actually levied the war or cauſed it to be levied by others. I ſubmit this idea to the Court not as one which I have had time to weigh and digeſt; but as one which they may perhaps find not unworthy of conſideration. But let me go ſtill farther in my admiſſions; let me admit not only that acceſſories are the creatures of the common law, but alſo that the common law is not in force in this country, and further that our ſtatute does not comprehend acceſſories; ſtill, before the priſoner can avail himſelf of theſe admiſſions, it muſt be ſhewn that he is an acceſſory: or in other words, that the part which he bare in this treaſon is ſuch as would *have* made him an acceſſory in felony. Gentlemen ſay that all are acceſſories who are not actually preſent at the offence: We on the contrary contend that even in inferior felonies a man may be a principal without actual preſence. Let us examine this queſtion. The law takes a diſtinction between actual and legal preſence. A man may be legally preſent, although actually abſent; and, even in felony, *legal* preſence makes a man as much a principal as *actual* preſence. I beg leave to introduce a ſeries of caſes which go to unfold and eſtabliſh this diſtinction; and I will preface them with this remark, that you will find, in the progreſs of theſe caſes, the ſphere of legal preſence perpetually extending itſelf, in proportion to the nature of the crime, and the extent of theatre which it requires for its perpetration. I proceed to lay the caſes before you. 1 Hale's P. C. 439—"if divers perſons come to make an affray, &c. and are of the ſame party and come into the ſame houſe, but are in ſeveral rooms of the ſame houſe, and one be *killed* in one of the rooms, thoſe that are of that party and that come for that purpoſe, though in the other rooms of the ſame houſe, ſhall be ſaid to be preſent." Here the houſe is the theatre, and it is required that thoſe who are to be implicated as principals ſhall be in the other rooms of the ſame houſe. The next is the caſe of the Lord Dacre, ſtated in the ſame page; it is this: "The Lord Dacre and divers others came to ſteal deer in the park of one Pelham; Rayden one of the company killed the keeper in the park, the Lord Dacre and the reſt of the company being in other parts of the park, it was ruled that it was murder in them all, and they died for it." Here as the park was the theatre of the meditated crime the ſcale of proximity is enlarged, and it was enough that the Lord Dacre and his aſſociates were in the ſame park to implicate them in the guilt. The next is Pudſey's caſe which is thus ſtated, 1 Hale's P. C. 534: Pudſey and two others, viz. A and B aſſault C to rob him in the high way, but C eſcapes by flight, and as they were aſſaulting him, A rides from Pudſey and B and aſſaults D, out of the view of Pudſey and B, and takes from him a dagger by robbery, and came back to Pudſey and B, and for this Pudsey was indicted and convict-

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ed of robbery; "tho' he assented not to the robbery of D, neither was it done in his view; because they were all three assembled to commit a robbery, and this taking of the dagger was in the mean time." Here as the highway and the whole forest were the scene of action, a still less degree of proximity was required than in either of the preceding cases, and indeed no limit of proximity is stated at all. But this case of Pudsey is irresistibly strong in another point of view, and contains a principle which covers the case at bar completely; that principle is this: Pudsey and his colleagues were leagued for the general purpose of robbing; they went out upon this purpose; and altho' Pudsey was not only absent at the particular act of robbing D, but gave no assent to that particular act, yet he was involved in the guilt of it, and suffered accordingly. The same author, page 537, contains a case which is, if possible, still stronger to the same purpose; it is the case of two men who go out for the purpose of robbing on the high way or committing a burglary, although one only commit the offence, and the other, so far from being present, is actually engaged in the perpetration of a different crime at a different place, yet this other is equally involved in the offence committed by the first. Hence it is not *actual presence* which makes a principal in felony; it is merely their going forth leagued in the same general design, and the willingness to co-operate for effecting the common purpose. Foster 349 50, thus treats the subject—"When the law requireth the presence of the accomplice at the perpetration of the fact in order to render him a principal, it doth not require a strict, actual, immediate presence, such a presence as would make him an eye and ear witness of what passeth. Several persons set out together upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, *and each taketh the post assigned him*; some to commit the fact, others to watch at proper distances and stations to prevent a surprize, *or to favor if need be, the escape of those who are more immediately engaged*: They are all, provided the fact be committed, in the eye of the law present at it; for it was made a common cause with them, each man operated in his station towards the same common end; and the part each man took, tended to give countenance, encouragement and protection to the whole gang, and to ensure the success of their common enterprize."—The reason of the law is the soul of the law. What is the reason then which according to Foster, constitutes the legal presence? It is, that the cause is a common cause; that each man operates in his station towards the same common end; that the part each man takes, tends to give countenance, encouragement and protection to the whole gang, and to ensure the success of their common enterprize. Whosoever, in any crime, performs a part within this description, is legally present and a principal in that crime. Foster proceeds—"I will not here multiply cases

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upon the aid of conſtructive preſence. This may be ſufficient by way of illuſtration. Others *founded in the ſame principle of mutual concert, aid and protection*, will fall in, in their proper places." In page 353-4. he keeps this promiſe—" A general reſolution againſt all oppoſers whether ſuch reſolution appeareth upon the evidence to have been actually and explicitly entered into or may be reaſonably collected from their number, arms, or behaviour at or before the ſcene of action; ſuch reſolutions ſo proved have always been conſidered as ſtrong ingredients in caſes of this kind. And in caſes of homicide committed in conſequence of them, every perſon *preſent in the ſenſe of the law*, when the homicide hath been committed, hath been involved in the guilt of him that gave the mortal blow. The caſe of Lord Dacres mentioned by Hale, and of Pudſey reported by Crompton and cited by Hale, turned upon this point. The offences they reſpectively ſtood charged with as principals, were committed far out of their ſight and hearing; and yet both were holden to be preſent. It was ſufficient that at the inſtant the facts were committed, they were of the ſame party and upon the ſame purſuit, and under the ſame engagement and expectation of mutual defence and ſupport with thoſe who did the facts."

Let us apply the reaſoning and principles of thoſe caſes to the caſe at bar. In order to do this with propriety, we muſt conſider the nature of the crime charged upon the priſoner; the theatre requiſite for its perpetration & the various parts to be performed in promotion of the general purpoſe. The charge in the indictment is treaſon in levying war againſt the U. States; the objects imputed to the priſoner are the ſeizure of Orleans and the ſeparation of the ſtates. We ſhall make a miſtaken application of the doctrines juſt inveſtigated, if we apply them to the overt act on Blannerhaſſet's iſland. That aſſemblage was not the object, the end, the cataſtrophe and conſummation of the treaſon; it was a mere tranſient and incidental effect of it. At the time then of this aſſemblage we are to conſider the priſoner's local poſition, not in reference to the aſſemblage, but to the general and grand object of the treaſon; not in reference to the iſland, but to the great theatre which the treaſon required and on which it was acting, from New York to Orleans. The gentlemen on the other ſide will not complain of this as a new idea. Mr. Wickham himſelf urged it and reiterated it for a different purpoſe, that the overt act was not the treaſon but merely evidence of it. When then, in the language of the caſes juſt read, we enquire whether the priſoner and the men on the iſland were of the ſame party and upon the ſame purſuit, the queſtion relates not to the iſland, which was certainly not their purſuit, but to the great and ſplendid purpoſe of ſeizing Orleans and rending the union forcibly aſunder; and in this light they were of the ſame party and upon the ſame purſuit; in this light they were " under the ſame en

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gagement and expectation of mutual defence and support; it was a common cause with them, each man operated in his station at one and the same instant towards the common end, and the part each man took, tended to give countenance, encouragement and protection to the whole gang, & to ensure the success of the common enterprize;" so that within every reason and principle assigned for the constitution of legal presence, they were all equally present. What though the prisoner gave no express assent to the particular meeting on the island; neither did Pudsey in the case cited assent to the particular robbery of D by A—but the purpose of Pudsey and A was the same common purpose which involved them in the same common guilt. So the purpose of the prisoner and the men upon the island was a common purpose, and therefore their guilt is the same. The part, therefore which the prisoner has in this transaction, is such an one, as in the case of felony would make him a *principal* and not an *accessory* as the gentlemen contend.

The result is in perfect harmony with the decision of the supreme court in the case of Bollman and Swartwout. Then we have seen that remoteness from the scene of the treason makes no odds; it is the being leagued in the same common cause and co-operating towards the same general purpose which gives to each man a legal presence although thousands of miles off, and makes him as much a principal as those who are actually present.

Having ascertained that the prisoner can in no view of *the law* be considered as an accessory in this case, let us enquire whether he can be so considered in reason.

A plain man who knew nothing of the curious transmutations which the wit of a man can work, would be very apt to wonder by what kind of legerdemain Aaron Burr had contrived to shuffle himself down to the bottom of the pack as an accessory, and turned up poor Blannerhasset as a principal in this treason. It is an honor, I dare say, for which Mr. Blannerhasset is by no means anxious; one which he has never disputed with col. Burr, and which I am persuaded he would be as little inclined to dispute on this occasion as on any other. Since, however, the modesty of Col. Burr declines the first rank and seems disposed to force Mr. Blannerhasset into it in spite of his blushes, let us compare the cases of the two men and settle the question of precedence between them. It may save a good deal of troublesome ceremony hereafter.

In making this comparison, sir, I shall speak of the two men and of the part they bore as I believe it to exist and to be substantially capable of proof; although the court has already told us that as this is a motion to exclude *all* evidence, generally, we have a right, in resisting it, to *suppose* the evidence which is behind, strong enough to prove any thing and every thing compatible with the fact of Burr's absence from the island. If it will be

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more agreable to the feelings of the priſoner to conſider the parallel which I am about to run, or rather the contraſt which I am about to exhibit, as a fiction, he is at liberty to do ſo; I believe it to be a fact.

Who then is Aaron Burr, and what the part which he has borne in this tranſaction? He is its author; its proprietor; its active executor. Bold, ardent, reſtleſs and aſpiring, his brain conceived it; his hand brought it into action. Beginning his operations in New York he aſſociates with him men whoſe wealth is to ſupply the neceſſary funds. Poſſeſſed of the main ſpring, his perſonal labor contrives all the machinery. Pervading the continent from New York to New Orleans he draws into his plan by every allurement which he can contrive, men of all ranks and all deſcriptions. To youthful ardor he preſents danger and glory; to ambition, rank and titles and honors; to avarice the mines of Mexico. To each perſon whom he addreſſes, he preſents the object adapted to his taſte; his recruiting officers are appointed; men are engaged throughout the continent; civil life is indeed quiet upon its ſurface; but in its boſom this man has contrived to depoſit the materials with which the ſlighteſt touch of his match produces an exploſion to ſhake the continent. All this his reſtleſs ambition has contrived; and in the autumn of 1806 he goes forth for the laſt time to apply this match. On this excurſion he meets with Blannerhaſſet.

Who is Blannerhaſſet? A native of Ireland, a man of letters, who fled from the ſtorms of his own country to find quiet in ours. His hiſtory ſhews that war is not the natural element of his mind; if it had been, he would never have exchanged Ireland for America. So far is an army from furniſhing the ſociety natural and proper to Mr. Blannerhaſſet's character, that on his arrival in America, he retired even from the population of the Atlantic ſtates, and ſought quiet and ſolitude in the boſom of our weſtern foreſts. But he carried with him taſte and ſcience and wealth; and, "lo, the deſert ſmiled." Poſſeſſing himſelf of a beautiful iſland in the Ohio, he rears upon it a palace, and decorates it with every romantic embelliſhment of fancy. A ſhrubbery that Shenſtone might have envied blooms around him; muſic that might have charmed Calypſo and her nymphs, is his; an extenſive library ſpreads its treaſures before him; a philoſophical apparatus offers to him all the ſecrets and myſteries of nature; peace, tranquillity and innocence ſhed their mingled delights around him; and to crown the enchantment of the ſcene, a wife, who is ſaid to be lovely even beyond her ſex, and graced with every accompliſhment that can render it irreſiſtible, had bleſſed him with her love and made him the father of her children. The *evidence* would convince you, ſir, that this is only a feint picture of the real life. In the midſt of all this peace, this innocence, and this tranquillity, this feaſt of the mind, this pure banquet of the heart—the

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deſtroyer comes—he comes to turn this paradiſe into a hell—yet the flowers do not wither at his approach and no monitory ſhuddering through the boſom of their unfortunate poſſeſſor warns him of the ruin that is coming upon him. A ſtranger preſents himſelf. Introduced to their civilities by the high rank which he had lately held in his country, he ſoon finds his way to their hearts by the dignity and elegance of his demeanor, the light and beauty of his converſation, and the ſeductive and faſcinating power of his addreſs. The conqueſt was not a difficult one. Innocence is ever ſimple and credulous; conſcious of no deſigns itſelf, it ſuſpects none in others; it wears no guards before its breaſt; every door and portal and avenue of the heart is thrown open, and all who chooſe it enter. Such was the ſtate of Eden when the ſerpent entered its bowers. The priſoner in a more engaging form, winding himſelf into the open and unpractiſed heart of the unfortunate Blannerhaſſet, found but little difficulty in changing the native character of that heart and the objects of its affection. By degrees he infuſes into it the poiſon of his own ambition; he breathes into it the fire of his own courage; a daring and a deſperate thirſt for glory; an ardour panting for all the ſtorms and buſtle and hurricane of life. In a ſhort time the whole man is changed, and every object of his former delight relinquiſhed. No more he enjoys the tranquil ſcene; it has become flat and inſipid to his taſte; his books are abandoned; his retort and crucible are thrown aſide; his ſhrubbery blooms and breathes its fragrance upon the air in vain—he likes it not; his ear no longer drinks the rich melody of muſic; it longs for the trumpet's clangor and the cannon's roar; even the prattle of his babes once ſo ſweet no longer affects him; and the angel ſmile of his wife which hitherto touched his boſom with ecſtacy ſo unſpeakable is now unfelt and unſeen. Greater objects have taken poſſeſſion of his ſoul—his imagination has been dazzled by viſions of diadems, and ſtars and garters and titles of nobility; he has been taught to burn with reſtleſs emulation at the names of Cromwell, Cæſar, and Bonaparte. His enchanted iſland is deſigned ſoon to relapſe into a deſert; and in a few months we find the tender and beautiful partner of his boſom, whom he lately "permitted not the winds of" ſummer "to viſit too roughly," we find her ſhivering at midnight, on the winter banks of the Ohio, and mingling her tears with the torrents that froze as they fell. Yet this unfortunate man, thus deluded from his intereſt and his happineſs—thus ſeduced from the paths of innocence and peace—thus confounded in the toils which were deliberately ſpread for him, and overwhelmed by the maſtering ſpirit and genius of another—this man, thus ruined and undone, and made to play a ſubordinate part in this grand drama of guilt and treaſon—this man is to be called the principal offender; while he, by whom he was thus plunged and ſteeped in miſery is comparatively innocent—a mere acceſſary.

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Sir, neither the human heart nor the human underſtanding will bear a perverſion ſo monſtrous and abſurd; ſo ſhocking to the ſoul; ſo revolting to reaſon. O! no, Sir. There is no man who knows any thing of this affair who does not know, that to every body concerned in it, Aaron Burr was as the ſun to the planet which ſurround him; he bound them in their reſpective orbits, and gave them their light, their heat and their motion. Let him not then ſhrink from the high deſtination which he has courted; and having already ruined Blannerhaſſet in fortune, character and happineſs forever, attempt to finiſh the tragedy by thruſting that ill-fated man between himſelf and puniſhment.

Upon the whole, Sir, reaſon declares Aaron Burr the principal in this crime, and herein confirms the ſentence of the law.

Before I conclude this point, I beg leave to notice ſome remarks of Mr. Wickham's on the act of Congreſs, touching crimes againſt the U. States, and which I omitted in the proper place. He ſays that Congreſs were aware that the common law was not in force here, and conſequently that acceſſories who are the creatures of the common law, would not be embraced by an act creating a felony in general terms; he infers this from their having preſcribed the puniſhment of acceſſories in the caſe of piracy and thoſe who reſcue after conviction of treaſon. I will make this remark upon the act of Congreſs; whenever it mentions acceſſories to any crime, it is for the purpoſe of diſtinguiſhing between the guilt and conſequently the puniſhment of acceſſories before and after the fact. I mentioned before, the line which reaſon had drawn between them. Congreſs has obſerved this line. Acceſſories before the fact in piracy, are puniſhed with death; Thoſe after it by fine and impriſonment. The XXIII Sec. of that act is confined merely to the caſe of reſcues after acquittal, and its object is ſimply to keep the courſe of juſtice clear. Congreſs knew that in treaſon, all were principals from the nature of the crime, and that it was therefore unneceſſary to implicate them in detail by a ſpecial act.

From what has been ſaid, I truſt it is clear both in law and reaſon, that Aaron Burr did not derive his guilt from the men on the iſland; but imparted his own guilt to them; that he is not an acceſſory in the crime, but a principal; and therefore that there is nothing in the objection which demands a record of *their* conviction before we ſhall go on with our proof againſt *him*.

But admitting, what is ſcarcely poſſible, that the Court ſhall think otherwiſe, and ſhall deem A. Burr an acceſſorial offender in the treaſon, can you for this, ſhut out the evidence from the Jury? The indictment does not charge Aaron Burr as an acceſſory; but as a principal. Whether he is a principal or not is the queſtion of *fact* which the Jury is ſworn to decide. Will you becauſe of *your* impreſſions of this fact, from a partial view of

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evidence, compel them to decide alſo upon that partial view? you do, do you not thereby diveſt the Jury of their proper d peculiar functions? The province of the Jury muſt not be vaded, Sir; the invaſion is big with danger and terror. I truſt at you will ſee this ſubject in the awful light in which it really nds, and that you will ſuffer the trial to take its natural courſe. The fourth and laſt objection to the admiſſion of our evi-nce is this: "That no evidence is relevant to connect the iſoner with others, and thus to make him a traitor by rela-n, until we ſhew an act of treaſon in thoſe others; and the emblage on the iſland was not an act of treaſon."

The queſtion which the Court is here called on to decide, is, hether the aſſemblage on Blannerhaſſet's iſland was a levying of war. The gentlemen who hold the negative of this poſition muſt admit that the intention of that aſſemblage was a treaſonable one; or elſe we cannot be debarred from proving it. They muſt admit that the individuals who compoſed that aſſemblage were enliſted by Aaron Burr, or by his ſubaltern officers; that, they had marched by individuals to the mouth of Beaver, a place of partial rendezvous: that when collected there, they proceeded to Blannerhaſſet's iſland, another place of rendezvous: where they were to receive an acceſſion of boats, men, proviſions, arms and ammunition, under the command of Blannerhaſſet himſelf; that from the iſland they proceeded to the mouth of Cumberland, a place of general rendezvous for the expected forces from the Eaſt and from the ſtates of Virginia, Kentucky, Ohio and Tenneſſee; that at the mouth of Cumberland they took in their commander in chief, the priſoner at the bar, with a conſiderable addition of men and arms, and proceeded to Baton Rouge, attempting the ſeduction of the officers and men at the ſeveral forts and garriſons of the United States, as they paſſed; which forts and garriſons were too weak to have reſiſted their paſſage with effect; that expecting the co-operation of the United States troops, the project was to ſeize upon N. Orleans, together with its bank, ſhipping, military ſtores, &c. to plant the ſtandard of treaſon and a ſeparate empire in that city, and to rend from the nation all that portion of territory which lies weſt of the Alleghany. All this they muſt admit, for this and more we are prepared to prove. The queſtion then is, whether, all theſe things admitted, the aſſemblage on the iſland was an overt act of levying war.

Here we are brought back to the conſtitution and act of Congreſs; and the enquiry is, what is *levying* war? Gentlemen on the other ſide ſpeaking on this ſubject, have very artfully dropped the word *levying* altogether. "Shew us your open act of war" they exclaim; "*hard knocks*," ſays Mr. Lee, are things we can all feel and underſtand; where are the hard knocks?" "Where was this bloody battle, this bloody war?" cries Mr.

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Martin. No where, gentlemen; there was no bloody batt
there was no bloody war. The energy of a deſpiſed and t
duced government prevented that tragical conſequence.
reply to all this bluſtering and clamour for blood and havoc;
me aſk calmly and temperately, does our Conſtitution and
of Congreſs require them? Can treaſon be committed by no
ing ſhort of actual battle? Mr. Wickham ſhrinking from a
ſition ſo bold and indefenſible, has ſaid that if there be
actual force, there muſt be at leaſt *potential* force—ſuch as ter
and intimidation ſtruck by the treaſonable aſſemblage. We
examine this idea preſently. Let us at this moment recur to
conſtitutional definition of treaſon, or to ſo much thereof as
lates to this caſe. "Treaſon againſt the United States ſ
conſiſt only in *levying war* againſt them;" not in *making* wa
but in *levying* it. The whole queſtion, then, turns on the mea
ing of that word, *levying*.

We know that ours is a motley language; variegated and e
riched by the plunder of many foreign ſtores. When we deri
a word from the Latin, the Greek, or any other foreign la
guage, living or dead, philologiſts have always thought it mo
ſafe and correct to go to the original language for the purpoſe
aſcertaining the preciſe meaning of ſuch word. *Levy*, we ar
told by all our lexicographers is a word of French origin: It i
proper therefore that we ſhould turn to the dictionaries of tha
language to diſcover its true and real meaning; and I believe w
ſhall not find that when applied to war, it ever means *to fight*
as gentlemen on the other ſide would have us to believe. Bo
yer's Dictionary is before me, Sir; and I am the more encou
raged to appeal to him, becauſe in the caſe of Bollman and Swart
wout, your honor, in eſtimating the import of this very word,
thought it not improper to refer to the authority of Dr. John
ſon. "*Lever*," the verb active, ſignifies, according to Boyer,
"to lift, heave, hold or *raiſe up*." Under the verb he has n
phraſe applicable to our purpoſe; but under the ſubſtantive
levee, he has ſeveral; I will give you them all:

Levèe d'un ſiege; the raiſing of a ſiege. Levèe des fruits;
gathering of fruits, crop or harveſt.

La Levèe du parlement Brittannique; the raiſing or receſs o
the Britiſh parliament: Levèe (collete de deniers) a levying,
raiſing or gathering: *Levee de gens de guerre, levying, levy or rai
ing of ſoldiers: Faire des levees de ſoldats; to levy* or *raiſe ſoldiers*
ſo that when applied to fruits or taxes, it means *gathering* as wel
as *raiſing*; when applied to ſoldiers it means *raiſing* only; no
gathering, aſſembling or *bringing them together even*; but merely
raiſing. Johnſon takes both theſe meanings as you mentioned, in
the caſe of Bollman and Swartwout; but in the original lan
guage we ſee that *levying*, when applied to ſoldiers, means ſim
ply the *raiſing* them, without any thing farther: in military mat
ters, *levy* and *raiſing*, if Boyer may be truſted, are ſynonimous.

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But to ascertain still more satisfactorily the meaning of this ord *levy*, let us look to the source from which we have borrow- d the whole definition of treason: the statute of the 25, E. That statute is in Norman French, and describing the trea- n of levying war, uses these words "*si home leve de guerre con- e nostre seigneur le roy en son royalme.*" In a subsequent reign, I ean the factious and turbulent reign of Richard the II. when e statute of Edward, although unrepealed, was forgotten, lost nd buried under the billows of party rage and vengeance, it ecame at length necessary for parliament to interfere and break pieces the engine of constructive treason; and in the 21st ar of Richard the II. a statute was passed which may be con- dered as a parliamentary construction of that of Edward the II. In that statute the treason of levying war is thus explained, *celuy que levy le people and chivache en counter le roy a fair guerre ins son realme.*" Here the French verb, *leve*, is the same as at used in the statute of Ed. with an unimportant orthogra- ic variation; and here, it is clearly contradistinguished from e actual war: — the *levy* is of *men* and *horses*, *for the purpose of aking war*; and the *levy* would have been complete, although e *purpose* had never been executed: I consider, therefore, the atute of Richard as not only adding another authority to that Boyer to prove that the extent of the French verb *levee*, when pplied to soldiers, goes no farther than the *raising* them; but consider that statute also as a parliamentary exposition or glos- ary of the phrase *leve de guerre* in the statute of Edward. In his latter opinion I am supported by 1 Hale 85, who speaking f the statute of Richard says "these four points of treason" ettled by the parliament of Richard, seems to be *included* with- n the statute of 25 E. 3. *as to the matter of them*, with these dif- erences. 1. The forfeiture is extended further than it was ormerly, namely to the forfeiture of estates tail and uses. 2. Whereas the antient way of proceeding against commoners, was y indictment, and trial thereupon by the country, the trial nd judgment is here appointed to be in parliament. 3. But hat wherein the principal inconvenience of this act lay, was his, that whereas the statute of 25 Ed. 3. required an overt ct to be laid in the indictment and proved in evidence, this hath o such provision." These are all the differences which he kes between them. Hence it is clearly the opinion of Hale hat the treason of levying war is *materially* the same in both sta- utes. For if the statute of Edward required *actual war*, *hard knocks*, *bloody battles*, to constitute treason, while that of Richard made the *mere preparation* for those purposes treason, would it, could it have escaped such a mind as Hale's; more particularly when he was especially employed in discriminating between the two statutes, and marking the points of difference, to the disadvantage of the statute of Richard. If nothing short

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of actual war will satisfy the statute of Edward, while that of Richard covers so much more ground as to comprehend the first act of recruiting, and to make that treason, how can the former be said to include the latter? it might with as much propriety be said, that a field of battle includes the kingdom within which it lies, or that the less includes the greater. Yet of this absurdity Hale has been guilty, unless it be conceded that the statutes of Richard and of Edward are materially the same: if in conformity to the opinion of Hale, this point be conceded, then as it is indisputably clear and certain that the statute of Richard makes levying of war to consist in the preparations for that war, in the raising of men, horses, &c. for the purpose of making war, then also under the statute of Edward, levying war means the preparations for that war. And if this construction of the statute of Edward be admitted, we have but to remember that our definition of treason is borrowed from this statute and to ask whether the same words, *levying war*, in the English and American statutes mean the same thing.

Confiding in the candour of this investigation and in the truth of the conclusion to which it has led me, I should myself have thought the mere enlistment of soldiers, of itself, an overt act of levying war. I should myself think such enlistment too, sufficient to satisfy *the reason* of the statute of Edward and consequently that of our Constitution and act of Congress in requiring an overt act to be proven. What is the reason avowed by all the books?—It is, because the secret intentions of the man lie beyond the ken of mortal sight. They can be known only to the man himself and to that being whose eye can pierce the gloom of midnight, and the still deeper gloom that shrouds the traitor's heart. To his fellow men those intentions can be manifested only by some external or overt act: I consider the phrase *overt act* as intended to be in contrast with *secret intention*; but whenever this secret intention, ripens and breaks out into an act of which the human senses can take cognizance, I consider the reason of the law as being satisfied; we are then relieved from the necessity of prying into and guessing at the secrets of the heart. It is not pretended that any case ever occurred to contradict this idea until the case which is reported by Ventris; which has been said by some modern English writer, and pronounced by your honor to settle the principle that the mere enlistment of soldiers is not sufficient to constitute the levying of war. Permit me, with the utmost deference and respect for your honor, to examine that case and see whether it justifies a conclusion so broad. That case it is to be observed is adjudged under the statute of the 25 Ed. 3. Now it requires but to adopt for a moment the idea which I have shewn to be sanctioned by Lord Hale, that the statute of Richard explains by a paraphrasis the more condensed definition of that of E. to per-

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ceive the reasoning and whole scope of the case in Ventris :— "If a man" says the statute of Ed "shall levy war against our Lord the King *in his realm*:" "or he" says the statute of Richard "who levies men and horses, against the King, *to make war in his realm*." The *levy*, then, is a totally different thing from the *war*, the *levy* is the *preparation*; the *war* is the *purpose*; but it is "to make *war in his realm*." Whereso*e*ver then the *levy* is made, the *purpose* must be to make *war in the realm*. Hence it is very clear that although the levying should be within the realm, the statute would not be satisfied, *unless the purpose*, also was to make *war within the realm*. It is upon this latter point alone that the case in Ventris turns, and not upon the scene of the enlistment, nor the insufficiency of the fact of enlistment. —The case in Ventris is that of Patrick Harding 2 Vol 315, 16: The charge in the indictment is compassing the death of the king and queen (Wm. and Mary) and the overt act laid is *levying war* by raising divers soldiers and men armed and *to be armed (armatos et armaturos)* "et milites sic ut præfertur levatos *extra* hoc regnum angliæ misit et iter secum suscipere procuravit ad se se jungendos aliis hostibus &c." the special verdict finds that the prisoner did "list, hire, raise and procure sixteen men, subjects of this kingdom, at the time &c. and those sixteen men so listed, hired, raised and procured, *did send out of this kingdom*, into the kingdom of France to assist and aid the French king &c."—"Upon this special verdict found, the Lord Chief Justice, Justice Gregory and Justice Ventris, who were then present at the sessions conceived some doubt; for they were of opinion that it did not come within the clause of the statute of 25 Ed. *of levying war*: for that clause is, if a man levy war against our sovereign lord the king *in his realm*; and by the matter found in the special verdict it appears that these men were listed and sent beyond sea to aid the French king." In the original report the words *in his realm* are printed in Italics, as marking the particular part of the statute on which the opinion rested. But suppose the purposed war had been *within* the realm; is not the implication from the reasoning of the court irresistible, that the enlistment would have been a sufficient overt act of levying? Is it not clear that the court in this case considered the statute of Edward as explained and expounded by that of Rich. II: that they distinguished between *the levy* and *the war*, and required according to the express letter of the second statute that not only the preparation, but the *purposed war* should be *within the realm*? But it has been said that if the enlistment had been a sufficient overt act of levying war, then war had been levied within the realm. But this is confounding the levy with the war, the means with the end, the preparaton with the purpose: it is losing sight of the requisition of the statute that not the levy merely; but the intended war shall be within the realm. Besides when the court *avow* the reason of their

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opinion; when they declare it to conſiſt (not in the inſufficiency of the fact of preparation, but) in the fact that the propoſed war was to be *out of the realm*, with what propriety can it be argued that their opinion reſted, not on the reaſon which they themſelves avow, but on one which they do not avow and which they diſapprove as far as they can do it by implication? If it was immaterial *where* the war was to be, if the enliſtment of men was in itſelf inſufficient as an overt act of levying war, why did not the court take this ground at once and ſay that the mere enliſtment of men was not an overt act of levying war? The anſwer is obvious; it was becauſe they conſidered the ſtatute as requiring that the purpoſed war ſhould be within the realm; whereas the war as found by the jury was intended to be out of the realm; and to my judgment, the inference is equally obvious that if the war had been found to be intended within the realm, the court would have had no doubt that the war had been levied by the enliſtment. The caſe in Ventris therefore is ſo far from warranting the concluſion that the mere enliſtment is not a ſufficient overt act of levying war; that in my conception, it warrants the concluſion that it is a ſufficient act. And if the caſe in Ventris does not juſtify that doctrine that enliſtment is inſufficient as an overt act, I defy the gentlemen to produce a caſe, *not dependant on that*, which does warrant it. But let me yield the authority of this caſe, let me admit it to prove what it has been ſuppoſed to prove, ſtill it impairs the etymology of the word *levying*, no farther than this, that raiſing men only is not levying war. How far then are we to carry the meaning of this word *levy?* Shall we add the other meaning of the word in the original language and ſay that the men muſt not only be raiſed, but they muſt be brought together or aſſembled? Be it ſo; and I contend that neither the courts of this country or of England have ever required more than *an aſſemblage* of men with treaſonable intent; whether they be armed or unarmed; whether they uſe force or not; whether their numbers be great or ſmall; ſtill according to authority the treaſon is compleat.

Arms are not neceſſary. Whenever the Engliſh books have appeared to require them, it will be found, on examination, to be in the ſtatement of ſome hypothetic caſe, *where the overt act is to contain, within itſelf, evidence of the treaſonable intent:* but whenever *the treaſonable intent* can be proved by evidence *extrinſic of the overt act*, arms have never in any caſe been required. 1. Hale 131. for example puts theſe caſes; "As where people are aſſembled in great numbers armed with weapons offenſive or weapons of war—if they march thus armed in a body—if they have choſen commanders or officers—if they march cum vexillis explicatis, or with drums or trumpets or the like."—In all theſe caſes there is not a word of extraneous evidence of the treaſonable intent:—but that intent was to be found in the appearance and warlike

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array of the assemblage itself. Mr. Dallas, whose legal opinions are certainly entitled to very high respect, when he was of counsel for John Fries, and was consequently not interested in extending the doctrine of treason, admitted the distinction which I have here taken. In page 103 of Fries's trial he is reported to have said—"As on the one hand I grant that the *circumstance of military array* is not *necessary* to an act of treason, *if the intention is traiterous*, so I insist on the other hand that the circumstance of military array will not constitute treason, without such intention." In this he is supported by all the English authorities. Lord Hale who seems more than any other writer or judge to narrow the doctrine of treason, no where says that arms are necessary. Speaking of the difficulty of defining what constitutes levying war, he says it is commonly *expressed* by the words *modo guerrino arraiati*, 1 Hale's P. C. 131, that is, in treating generally of the subject or describing the offence in indictments it is so commonly *expressed*; and in this light he is understood by Foster 208. So far indeed is Lord Hale from requiring military array, that by the strongest implication he declares it unnecessary.—"Again, the actual assembling of many rioters in great numbers to do unlawful acts, if it be not *modo guerrino* or *specie belli*, *as if they have no military arms nor march nor continue in the posture of war*, may make a great riot, yet doth not *always* amount to a levying of war." What is the candid inference from this passage? that *sometimes* such an unarmed assemblage, without the warlike array or the shew of war, *may* amount to a levying of war; for if this be not the inference the word *always* used by Lord Hale has no signification whatever. I affirm that no case can be produced to shew arms to be necessary; that no description of an overt act in which arms form a necessary ingredient can be adduced, unless when the overt act is itself to afford the only evidence of the design: nor can even the *dictum* of an elementary writer be adduced to prove that arms are necessary. That on the contrary every writer and every judge who has had occasion to mention the subject directly, has declared arms to be unnecessary, if the intention can be otherwise proven. I do not think, says Foster 208, any great stress can be laid upon this distinction," (being armed or unarmed.) It is true that in case of levying war, the indictments generally charge that the defendants were armed and arrayed in a warlike manner; and where the case would admit of it, the other circumstances of swords, guns, drums, colours, &c. have been added. But I think the merits of the case have never turned singly on any of these circumstances."

"In the cases of Damaree and Purchase," he continues, "which are the last *printed* cases which have come in judgment on the point of constructive levying war, there was nothing *given in evidence* of the usual pageantry of war, no military weapons, no banners or drums, nor any regular consultation previous to

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the rising; and yet the want of these circumstances weighed nothing with the court, though the prisoner's counsel insisted much on that matter." In the same paragraph he adds what confirms Mr. Dallas' distinction—"The *true criterion* in all these cases is *quo animo*, did the parties assemble." East in his crown law, page 67, collects the authorities together and proves the truth of Foster's positions, that arms or military array are unnecessary; and that the intention is the *criterion*.—Judges Chase, Iredell, and Foster, expressly declare themselves of Foster's opinion. I beg leave to read a short paragraph from judge Chase's charge to the jury on the trial of Fries, 197. "The court are of opinion that military weapons (as guns and swords mentioned in the indictment) are not necessary to make such insurrection or rising amount to levying war; because numbers may supply the want of military weapons, and other instruments may effect the intended mischief: *The legal guilt of levying war may be incurred without the use of military weapons or military array.*" I think I may now consider it as proven that arms are not necessary to the constitution of treason. Since then *no arms* were *necessary* to make the assemblage on the island a treasonable assemblage, it is scarcely worth while to notice Mr. Wickham's observation that the rifles which are proven to have been in the hands of the men there, are not necessarily military weapons. I suspect, however, that there may yet be those living in Great Britain who remember the name of general Morgan, and who can bear witness that a rifle in the hands of a back-woodsman of America is a military weapon, emphatically, and as formidable a one too as a soldier need wish to encounter.

But we are told if *arms* be not necessary, *force is necessary* to make an assemblage treasonable: let us now enquire if this be so.

On this branch of the enquiry I beg leave to premise that in the several cases on this subject the word *force* is generally used figuratively; intended to signify the assembled body and not any deed of violence actually committed by them: thus in Vaughan's case it is stated that he came with an *armed force*; and in the opinion of the presiding judge of this Court, in the motion to commit the prisoner in March last, we also find this word used in this figurative sense—page 33: after saying it is clear that an intention to commit treason is an offence entirely distinct from the actual commission of that crime the judge proceeds. "War can only be levied by the employment of *actual force*. Troops must be embodied; men must be assembled in order to levy war." The troops then being embodied, the men being assembled, war is thereby levied; force is employed; not that a blow is actually struck; but that there is a body capable of using force, if they please to use it. Sir, as to the demand of actual violence, there is not an English authority which countenances it; they concur in disclaiming it. They take the distinction be-

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tween the *bellum levatum* and the *bellum percussum*: thus Foster 218. "An assembly armed and arrayed in a warlike manner for any treasonable purpose is *bellum levatum* although not *bellum percussum*. *Listing and marching are sufficient overt acts without coming to a battle or action.*" 1 East 67 repeats this doctrine, and cites various cases in support of it. Salkeld's Reports 635 — "there may be levying war without actual fighting." Same case 5 St. Tr. 37.—There is not a single English authority which requires force, that is actual violence, or the *bellum percussum*: the assemblage and clear evidence of the treasonable design have always been held sufficient. The case of Purchase has been erroneously stated from the bar. That case did not turn upon the question of force or no force; the difficulty in his case arose from this circumstance; it appeared that Purchase knew nothing of the designs and motives of the rising: it was questioned therefore whether the act of others could be imputed to him. This is proven by the original trial itself; and so Foster 215, considers it. "With regard to Purchase there was some diversity of opinion among the Judges present at his trial, because it did not appear upon the evidence that he had any concern in the original rising, or was present at the pulling down any of the houses, or any way active in the outrages of the night, except his behaviour at the bonfire in Drury Lane, whither he came by mere accident for aught appeared to the contrary;" but suppose he had been concerned in the original rising, or had been present at the pulling down the houses and encouraged it by his voice; would there have been any doubt? The reasoning of the case shews that there would not; and even as it was, although three of the judges *doubted*, the majority of them agreed to his guilt and he was condemned accordingly. The case in Kelying 75 on which the gentleman so much relies to prove the necessity of force, is one of those cases in which the treasonable intent is only manifested by the employment of force and the extent to which it is carried. It was the case of a riot, a sudden ebullition of popular passion preceded by no concert, no arrangement and a case therefore in which the intent was unsusceptible of proof, except by the acts of the mob. It was a case, I will add, in which any kind of force would not have been sufficient to make it treason; for if they had stopped with pulling down one bawdy house, or opening one prison to let out a favourite prisoner, that would have been a riot merely; they continued however, together, and in action for two days, and shewed by the extent and nature of the violence which they practised, that their intent was general and universal. From such a case surely nothing can be inferred which will fairly apply to a case so different as that at bar: a case in which there was a previous concert and arrangement, and a case in which the *ea animo*, the criterion of the crime, is susceptible of proof indo-

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pendent of the assemblage. Let us come now to our own country and see if our adjudications require actual force. Before I proceed to the examination of Fries's case, let me remind you of an observation of Mr. Randolph's, equally elegant and true; "an elementary principle resulting from the circumstances of a particular case and to be found in that single case only, should never be applied except to a case parallel in its circumstances." Nothing can be more just than this remark; and it is by violating the rule which it contains, that so much jarring, so much irreconcileable discord, so much Babylonion confusion is seen to exist among our cases. With this remark let us come to the trial of Fries. What was the circumstances of that case? There had been actual violence; it was also a disorganized and disorderly riot, and the reasoning of the British cases applied to its character. But as there had been violence in that case, and the judge in charging the jury was giving a description of treason adapted to the case at bar, what was more natural than for him to introduce that feature of the case into his description. It will be found that Judge Chase considers the case of Fries as a riot and reasons upon it in that point of view, applying to it all the English doctrine of riot, where violence, as before remarked, is the only evidence of treasonable intent. But if each *dictum* of the Judge in delivering that charge is to be considered as an abstract truth, it will be easy to find in that charge the clearest indications of his opinion that violence is not necessary. This in page 196. "It is the opinion of the Court that any insurrection or rising of any body of people within the United States *to* attain or effect by force or violence any object of a great public nature or of public and general, (or national) concern, is levying of war against the United States, within the contemplation and construction of the constitution." Here it is not the *actual attainment of the object, by violence*, which is declared to constitute the treason; it is the rising *for that purpose*; and in this supposed case nothing is found but the assemblage and the treasonable purpose or intent. In the succeeding paragraph he repeats the same opinion. In the next he declares military weapons unnecessary; Then proceeds with the more particular doctrines of riots as that the purpose must be general or universal not private or personal. The intention he says is the true criterion of the offence. The next comes a paragraph which has been much relied on; "The Court are of opinion that if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States by force that they are only guilty of a high misdemeanour; but if they proceed to carry such intention into execution *by force*, that they are guilty of the treason of levying war; and the *quantum* of the force employed, neither lessens nor increases the crime whether by one hundred or one thousand persons is wholly im-

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material." I understand the word *force* here, to be used in its figurative sense; that it is used as contrasted with the conspiracy or meditation of the treason; that it is used to signify the body assembled for the purpose of carrying that conspiracy into effect; hence it is, that in the concluding member of that paragraph, he speaks of the number so assembled, or what he calls *the quantum of the force*, declaring it to be immaterial whether by one hundred or one thousand. In the next paragraph he maintains the same idea, concluding that paragraph with these words, "*but it is altogether immaterial whether the force used is sufficient to effectuate the object; any force connected with the intention will constitute the crime of levying war.*" He proceeds to state that this opinion is in substance the same with the opinion of the Circuit Court in 1795 in the case of Vigol and Mitchell. Now in the case of Vigol, 2 Dall. 347, the Court give no absolute opinion; the opinion is rigidly confined to the circumstances of that case, in which the judge states, there were acts of violence and devastion. But in the case of Mitchell, Id. 356. The Judge, Patterson, commenting on the circumstance of its not being sufficiently proven, that the prisoner was at General Nevill's house, where the violence was used, speaks thus:—"He is proved by a competent number of witnesses to have been at Couches Fort. At Couches Fort the conspiracy was formed for attaking General Nevill's house, and the prisoner was actually passed on the march thither. Now in Foster 213, the very act of marching is considered as carrying the traitorous intent into effect;" In a subsequent part of his opinion speaking of the conspicuous figure which the prisoner had made, the Judge uses these explicit words, "His attendance armed, at Braddock's field would *of itself* amount to treason, if his design was treasonable." So that if Judge Chase's opinion be, as he professes, *substantially* the same with this of Judge Patterson's, then a deed of violence is not necessary, but the assembly and treasonable intent are enough. Judge Chase sums up his opinion in these words. "If from a careful examination of the evidence, you shall be convinced that the real object and intent of the people assembled at Bethlehem was of a public nature (which it certainly was if they assembled with intent to prevent the execution of both the above-mentioned acts of Congress or either of them) it must then be proved to your satisfaction that the prisoner at the bar incited, encouraged, provided, or assisted in the insurrection or rising of the people at Bethlehem, and the terror they carried with them, with intent to oppose and prevent, by means of intimidation and violence, the execution of both the above mentioned acts of Congress or either of them; and that some force was used by some of the people assembled at Bethlehem." But for these concluding words the opinion of the Judge would have resulted merely in

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requiring what Mr. Wickham calls *potential force*; the last words may well be accounted for from the particular circumstance of this case in which there was actual violence; and I will venture to affirm that it is the only case in which a deed of violence ever was declared necessary when the assemblage and treasonable intent could both be made out by proof independent of any such deed. If there be another let it be shewn. If this case stands alone, why will you make this principle an abstract and general one; since in the language of Mr. Randolph it results from the circumstances of this particular case and can be found in this case only. I have shewn that in England the distinction is clearly settled between the *bellum levatum* and the *bellum percussum*; and that there war may be levied although no blow be struck; I will now shew that by the authority of a Court of this country superior to that in which Judge Chase sat, it has been in substance declared again and again, that war may be levied without battle; that the assemblage with a treasonable intent *compleats* the crime of levying war; you will know Sir, that I am referring to the opinion of the Supreme Court in the case of Bollman and Swartwout. In that case page 39—40, the Court commences the declaration of its opinion.

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies giving them aid and comfort."

"To constitute that specific crime for which the prisoners now before the Court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into operation *by the assemblage of men for a purpose treasonable in itself*, or the fact of levying war cannot have been committed."

Is there any requisition of force here? Is it said that the conspiracy must be brought into operation by the assemblage of men for a purpose treasonable in itself, *and by deeds of force and violence*, or the fact of levying war cannot have been committed? No, Sir, it is *the assemblage of men for a purpose treasonable in itself*, which *alone* is declared sufficient to make the fact of levying war. "It is not the intention of the Court to say, that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, *if war be actually levied*, that is, *if a body of men be actually assembled for the purpose of effecting, by force, a treasonable purpose*, all those who perform any part, however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be *an actual assembling of men for the treasonable purpose*, to constitute a levying of war." Here force is

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mentioned; but how is it mentioned? merely as the ultimate purpose of the assemblage: the means by which they intend to execute their treasonable design: So in the assemblage on the island their object was the seizure of Orleans; they intended to effect that purpose by force: there was then a body of men actually assembled; and the purpose which brought them together, and which they were going to effect by force, was a treasonable purpose. "To *compleat* the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design." Here an actual assemblage of men for the purpose of executing a treasonable design is declared to *complete* the crime of levying war: not a word of force or deeds of violence; yet the crime is *completed*. The Court profess to be enumerating the ingredients which taken together would make this crime; and conclude the enumeration by stating that that would *complete* it, yet it is pretended by the gentlemen on the other side that the great ingredient of force and violence not enumerated by the Court is necessary to its completion. "In the case now before the Court, a design to overturn the government of the U. States in New Orleans by force, would have been unquestionably a design which, if carried into execution would have been treason, and the assemblage of a body of men *for the purpose* of carrying it into execution, would *amount* to levying war against the United States, but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war." Here again the Court declare that the assemblage for the treasonable purpose would *amount* to levying war; well, if that would amount to levying war, it required nothing else to make it amount to it; yet gentlemen persist in saying it did require something else, as deeds of violence, to make the assemblage an act of levying war, or what is bolder still, that these deeds of violence were required by the opinion of that Court. In other words that while the Court was perpetually and uniformly saying one thing, they as uniformly meant a totally different one.—Let us proceed with the opinion. "If this enterprize was against Mexico, it would amount to a high misdemeanour; if against any of the territories of the United States, or if in its progress the subversion of the government of the United States, in any of their territories, was a mean clearly and necessarily to be employed, if such mean formed a substantive part of the plan, the *assemblage of a body of men to effect it* would be levying war against the United States."

"But whether this treasonable intention be really imputable to the plan or not, it is admitted that it must have been carried into execution *by an open assemblage of men* for that purpose, previous to the arrest of the prisoner, in order *to consummate* the crime as to him; and a majority of the Court is of opinion, that the conversation of Mr. Swartwout affords no sufficient proof of such assembling."

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We have been before told that the aſſemblage with the treaſonable intent would *amount* to levying war, would *compleat* the crime of levying war; here in variant language, but language equally as ſtrong if not ſtronger—we are told, that if the treaſonable intent is carried into execution, how? by deeds of violence and force? No: but by an open aſſemblage of men for that treaſonable purpoſe; this crime is *conſummated*; not that by ſuch aſſemblage the crime is in an incipient ſtage; not that it is advancing to maturity; but that it is *conſummated.* To remove all poſſibility of doubt, the Court then begin to conſider the ſubject analytically. "The priſoner ſtated that" "Col. Burr, with the ſupport of a powerful aſſociation, extending from New York to New Orleans, was levying an armed body of 7,000 men from the ſtate of New York and the weſtern ſtates and territories, with a view to carry an expedition to the Mexican territories."

"That the aſſociation, whatever may be its purpoſe, is not treaſon, has been already ſtated. That levying an army may or may not be treaſon, and that this depends on the intention with which it is levied, and on the point to which the parties have advanced, has been alſo ſtated. The mere enliſting of men without aſſembling them is not levying war. The queſtion then is whether this evidence proves Col. Burr to have advanced ſo far in levying an army as actually *to have aſſembled them.*" Here again it is clear that if the caſe has gone ſo far as that the men have been aſſembled, the crime in the opinion of the Court is compleat. Proceeding with the analyſis the Court ſay: "*It cannot be neceſſary that the whole army ſhould aſſemble,* and that the various parts which are to compoſe it ſhould have combined. But it is neceſſary there ſhould be an actual aſſemblage, and therefore this evidence ſhould make the fact unequivocal."

"The travelling of individuals to the place of rendezvous would perhaps not be ſufficient. This would be an equivocal act, and has no warlike appearance." *The meeting of particular bodies of men and their marching from places of partial to a place of general rendezvous, would be ſuch an aſſemblage.*

"The particular words uſed by Mr. Swartwout are, that Col. Burr was levying an armed body of 7,000 men. If the term levying in this place imports that they were aſſembled, then ſuch fact would amount, if the intention be againſt the United States, to levying war.—If it barely imports that he was enliſting or engaging them in his ſervice, the fact would not amount to levying war.

"It is, therefore, the opinion of a majority of the court, that in the caſe of Samuel Swartwout, there is not ſufficient evidence of his levying war againſt the United States to juſtify his commitment on the charge of treaſon." After this language ſo clear and unequivocal, I ſhould feel that I was inſulting the under-

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ſtanding of the court, if I were to preſs the enquiry whether deeds of violence are neceſſary to conſtitute the treaſon of levying war againſt the U. States. So far from deeds of violence, the court does not even require the aſſemblage of the whole force; but expreſsly declare that the mere *marching of individuals from a place of partial to a place of general rendezvous is ſuch an aſſemblage* as would amount to levying war. Our court in this caſe has clearly maintained the line of demarcation acknowledged by the Britiſh courts between the *Bellum levatum* and the *Bellum percuſſum*.

Does reaſon, Sir, any more than law, require that you ſhould wait until the blow be ſtruck? If ſo, adieu to the law of treaſon and to the chance of puniſhment. The aſpiring traitor has only to lay his plan, aſſemble his forces, and ſtrike no blow till he is in ſuch power as to defy reſiſtance. Then what becomes of your conſtitution, your law of Congreſs or your courts? He laughs them to ſcorn.

But where can be the neceſſity of waiting for actual violence? The overt act is only required as proof of the ſecret intention: now, although it is true, as Mr. Lee ſays, that hard knocks are things we can all feel, yet it is equally true, that an aſſemblage of men is an object we can all ſee; true it is, as the gentleman ſays, that ſmall arms and cannons may be heard; ſo may the diſcloſure of a treaſonable plot. At leaſt the overt act which they require is but an appeal to the human ſenſes; and the overt act which we have proven is equally ſatisfactory to them.

But Mr. Randolph wiſhes to know if enliſting be not enough, where you will draw the line ſhort of force: the anſwer is obvious; *at the aſſemblage*; where the courts of England and the higheſt court of this country have concurred in drawing it.

Mr. Wickham, indeed, complains that if you ſtop ſhort of actual force, you take away the *locus penitentiæ*. I ſay, if you do not ſtop ſhort of it, you take away the motive of repentance; for you offer the traitor victory and triumph, and it is not in their arms that we are to expect from him repentance. But was there, ſir, no opportunity for repentance in this caſe? We ſhall prove that the priſoner was for more than a year brooding over this treaſon. The ruin and deſolation which he was about to bring upon this country, muſt have been often before him. If all love of his country were ſo far extinguiſhed in his breaſt that he would not forbear; if the downfall of liberty and the horrors of civil war gave no pang of remorſe to his boſom, why for his own ſake did he not repent? Why did he not remember the treaſon of Cæſar and the dagger of Brutus? Why did he not remember Cromwell, as bold and daring as himſelf, and the miſerable effects of his ſucceſsful uſurpation; the terrors that haunted and ſcourged him day and night, and blaſted him even amidſt the ſplendor of a palace. Cæſar and Cromwell, he did remember; not to deteſt and to repent; but to envy, to admire and to emu-

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late. Such is the kind of remorse which he felt at the idea of drenching his country in blood, and substituting despotism for liberty; such the very promising disposition and temper for repentance which alone he manifested.

Sir, it is clear that neither reason nor law require actual war, the *bellum percussum*, in order to make a levying of war.

But Mr. Wickham tells us, that if *actual force* be not necessary, *potential force* at least is necessary; and by potential force he means intimidation. To illustrate his meaning still more distinctly, he puts this case: suppose a body of men assemble in the country in great numbers and move into this town for the purpose of attacking the capitol and seizing the public arms; the people of the town, intimidated by them, stand aloof and make no resistance; this, says he, is potential force.

To this requisition I have two answers:

First, that neither the law of England nor the supreme court of this country require any such thing. I need not repeat the authorities upon this subject. The passages which I have recently read from the decision of the supreme court are fresh upon your memory; and you know that they do not even squint at any such idea; but repeatedly declare the crime to be *compleated* and *consummated* by the bare assemblage for a treasonable purpose.

My second answer to this requisition of potential force is this, that if it be necessary, and if I understand what is meant by it, it does exist in the case at bar. Let us examine what is meant by potential force. In the case put by the gentleman of a multitude marching to attack the capitol and the people of the town standing off in apprehension and alarm; what is the force which operates? not hard knocks, confessedly; but the excitement of fear and apprehension. Suppose, however, that the town people, instead of being frightened into submission, had been excited by apprehensions for their capital and themselves, to take arms in their defence; the same affection of the mind would still be in operation, although in a different degree; it would still be apprehension for their safety, which would urge them to their defence; in this case the approaching body, although not successful, has had its effect; it has compelled the town to arm in opposition to it; would not this be completely the exertion of potential force; would not the town have been forced to its defence; and as the force which produced that effect was not *actual*, must it not have been *potential*? Suppose, in this case, the town, thus compelled to arm in its defence, should march out to meet the approaching body; should rout them, without a blow on either side, and should seize and destroy their baggage waggons: I ask whether this approaching body, formed of citizens, would not be traitors? My reason and judgment tell me that the force then acting on the inhabitants of the town, the alarm which made them fly to arms, *is potential force*; and that those who had ex-

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erted this ſpecies of force upon the town, would be traitors even according to Mr. Wickham's conception.

I aſk then, whether the aſſemblage on Blannerhaſſet's iſland did not exert this ſpecies of potential force on the ſurrounding country? What was it that urged the ſtate government of Ohio, to ſend a body of men to take this party and ſeize their boats? It was a well founded alarm and apprehenſion of the objects of this aſſemblage. What was it that cauſed the militia of Wood County to be put in motion and marched to the iſland? "The ſame mental affection, the ſame potential force, the ſame alarm and apprehenſion which had acted on the government of Ohio? What was it, when this aſſemblage fled from the iſland and advanced down the river, gathering, like a ſnow ball on the ſide of a mountain, magnitude and momentum as it rolled along? what was it that threw the city of New Orleans into diſmay and conſternation, and produced the movement of the American army in that quarter for its defence?—Sir, this terror and alarm aroſe from the deſigns of the priſoner and his party: deſigns which we ſhall prove upon them, if permitted. And contemptible in point of numbers as the party under Aaron Burr may appear, it will be ſhewn to you, Sir, that the United States had not a garriſon on the river, nor in New Orleans in the *then* temper of that city, capable of reſiſting the deſigns of the priſoner. Theſe are facts which will be in proof if the evidence ſhall go on: and farthermore, if the accuſed and his party may be believed, that he had men engaged, and prepared to join him at the motion, of his finger in ſufficient force to have given battle, and in a better cauſe, ſucceſsful battle, to the whole army in the South. This threatened power did not indeed riſe and ſhew itſelf; the unexpected vigor of the government, and the equally unexpected virtue and indignation of the country, awed them into ſilence and kept them down. Upon the whole, Sir, if potential force be required, we ſhall prove it in this caſe: and I believe it is by this time too apparent that the aſſemblage on the iſland had every character and property which either law or reaſon require to conſtitute an overt act of levying war.

But let me ſuppoſe that you ſhall think otherwiſe; to whom does it belong to decide whether there has been an overt act or not? What did you yourſelf decide the other day upon this ſubject?

"Levying of war, is a fact, which muſt be decided by the Jury. The Court may give general inſtructions on this, as on every other queſtion brought before them, but the Jury muſt decide upon it as compounded of fact and law. Two aſſemblages of men not unlike in appearance, poſſibly may be, the one treaſonable and the other innocent. If, therefore, the fact exhibited to the Court and Jury, ſhould, in the opinion of the Court,

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not amount to the act of levying war, the Court could not stop the profecution—but muſt permit the counſel for the United States to proceed to ſhew the intention of the fact, in order to enable the Jury to decide upon the fact, coupled with the intention."

In ſtrict uniſon with this opinion is the Engliſh law. 1 Hale, P. C. 1 Eaſt 67. This Court then having itſelf decided that the queſtion whether there has been an overt act or not belongs excluſively to the Jury, it is ſtrange that the priſoner ſhould perſiſt in preſſing it on the Court. What does he mean by it? Such an anxious perſeverance in this courſe certainly implies a reflection either on the Jury or the Court; it implies his belief, either that the Jury will not do him juſtice; or that the Court will do him more than juſtice; if he believed that the Jury would do him Juſtice, and wiſhed nothing more, he would be content to leave his caſe to the Jury: if he believed the Jury would not do him juſtice and he therefore tries to force his cauſe before the Court, whether they will or no, I may truly ſay that he exhibits a phœnomenon unprecedented upon this earth; a man flying from a Jury of his peers to take refuge under the wings of the Court. Sir, I can never think ſo illy of my countrymen as to believe that innocence need to fly from them. Nor will my reſpect for this Court ſuffer me to apprehend for a moment that any conſideration will induce them to invade the peculiar and acknowledged province of the Jury. Sir, I believe that my reſpect for this Court, perſonally and officially, is too well known, to apprehend that remarks of a general nature will be applied to them. But if, at this period, when the intellectual power and illumination of the bench is ſo univerſally admitted, a precedent be ſet, by which the great facts in a trial for life and death, ſhall be wreſted from the Jury and decided by the bench ——————what uſe may not be made of it hereafter!—In the fluctuations of party—in the bitterneſs and rancour of political animoſity—ſome tyrant Bromly, or ſome ruffian Jeffries may mount the bench!—can the ſoul look forward, without horror, to the dark and bloody deeds of death which he might perpetrate armed with ſuch a precedent as you are now called on to ſet. But you will not ſet it, Sir. You will not bring your country to ſee an hour ſo fearful and perilous as that which ſhall witneſs the ruin of the trial by Jury. I ſhudder to reflect what might be the conſequences of ſuch an hour.

I have finiſhed what I had to ſay Sir: I thank the Court for its patient and polite attention. I am too much exhauſted to recapitulate, and to ſuch a Court as this I am ſure it is unneceſſary.

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Mr. Botts.

May it please your honours.

It is not very likely that *I* shall be able to follow the gentleman, just sat down, in all the mazes to which he has led the way: nor is it likely that I shall be able to produce such an abundance of trophes and figures as he has done, in such great abundance:—it is not likely that I shall be able to climb up to the clouds for the purpose of carrying Bonaparte's army there to quench the stars. All this magnificent and delightful matter, calculated to exercise the fancy, and to produce the delight and wonder of the audience, would give more relish, and better fit a theatre, than a hall of justice. I shall therefore leave the gentleman to go on with his exhibition, and shall proceed to consider the question now proposed to *this* Court.

The first proposition which naturally occurs in the investigation of this subject, relates to the act of war. I say that the acts which are proved to have taken place on Blannerhasset's island, were not, in themselves, acts of war, and that no proof, whatever, of intention, could make them acts of war.

The facts, Sir, are these—a few men, about 30, landed upon this island, where they remained two or three days: they had some few arms with them, and a small quantity of ammunition: they had some provisions in their boats, to keep them whilst descending the river. At some place contiguous to the island, they went out to kill squirrels, and what adds greatly to the circumstances of an overt act having been committed, they could not return again without, (what one of the witnesses calls it) a watch word being given. Among these men were Comfort Tyler and Mr. Blannerhasset, who were, (confessedly,) ignorant of any treasonable project; but as a report had circulated, from some boats having descended from Beaver, the destination of which was not generally known, they got alarmed lest they should be attacked by a mob; and therefore they fled secretly and in the night, before the mob arrived. And this was not to evade a legal investigation, for a declaration, it appears, was made by Mr. Tyler, that it was not his purpose to resist the constituted authorities of his country; and we have no evidence to support an idea that there would have been any such resistance offered. As to the circumstance of the 6 or 7 guns being presented at Gen. Tupper, we need not trouble the Court to examine about: for if that could be considered as an act of treason, first there is only *one* witness to speak of that fact, (although there were several persons present.)

But, (secondly,) if there had been any act of violence offered, either to an officer, or to a private individual, as the evidence is produced, it would have been no offence, because the officer, who is mentioned, was from Ohio, from which state he must have derived his authority, (if any he had). He, therefore, must be considered as a private individual, and without authority. But, Sir, whilst, I make this admission, I would observe that this witness has committed himself, upon so many points, as to merit your honor's entire disregard as to the overt act. I do not therefore, think it necessary, at this time, to enumerate those circumstances, as they *must* be discredited.

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Now, Sir, the proposition on the other side is, that the acts (which have been enumerated) on Blannerhasset's island, were overt acts of war.—They certainly must be, either against New-Orleans, (2500 miles off,) or they must be intended against Wood County in Virginia, I do not know which; for we have never had any evidence to tell us!—Boats, oars, provisions for a long journey, and the descent of the river, are all the materials which the prosecutor can collect to prove an overt act of war! It is probable that the gentleman might calculate upon an overt act of war being meditated against the people of Wood County, because they were provided with such sort of apparatus, as axes, rifles, &c.

But, it is said that the party fled, in consequence of a fear that these people should attack them. Now, I think, that, instead of this proving the meditation of an act of war on their part, it proves the contrary. According to this reasoning, if I should run away, to avoid a beating, I am to be considered as guilty of assault and battery. It was upon such suppositions they drew a conclusion.

But, if the act was not against the Western Country it was against New Orleans. And here is Mr. Hay's definition of treason; "any assemblage of men, convened for the purpose of effecting, by force, a treasonable design, which force is meant to be employed before their dispersion"—is treason. But, Sir, I have collected another definition from the gentleman's arguments it is this—"any assemblage of three or more persons, without arms, organization, or treasonable thought: and with every mark of peace and patriotism in their hearts: but they have a communication from a fourth person, then 3000 miles off, informing them in terms, not generally understood, of a project, and promising his assistance in it, will constitute an overt act of war, though there be not even the appearance of war in it."—This monster, Sir, is the common co-partner and child of the three gentlemen on the other side. I have picked up, here and there, as they have scattered them, the limbs, the trunk, and the head; and I have put them together, and will shew that it is the genuine offspring of them. I say that an assemblage of three or more persons without arms might constitute a riot, or an unlawful assemblage; but they say that three or more persons meeting, under particular circumstances and with particular intentions, will constitute a levying of war.

Thus, according to Mr. Hay's position, an assemblage of three persons, without arms, or even (in themselves) without a treasonable thought, may be guilty; and thus, although Col. Burr was not on the island, but perhaps hundreds of miles from it, is charged with having a connection with those who did assemble, and, though he might have known nothing at all, of them, he is charged as their chief and *primum mobile!* (He quoted parts of Mr. Hay's speech to prove this position, and contended that, according to this doctrine, the overt act of war might be proved if any wretch could be found to swear that Col. Burr informed him 30 years ago, that he intended to commit war against the United States by separating from it a place 2200 miles from where it was proved an assemblage had taken place, of which the pri-

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son charged as the principal, could not be proved to know any thing. Such a wretch might be picked up: but where is another to be had? It requires two witnesses to an overt act of treason. Why one may prove the declaration and another might prove the assemblage and progress of the party, no matter whether the principal was present or not! Why, Sir, certainly my argument on these premises is correct—for if they can be permitted to produce declarations made one, two, or three years ago, they may 20, and to strengthen the absurdity, the declaration may be made to commit war against the United States, when New Orleans is without the limits of the United States. [To exemplify this general position, Mr. Botts referred to the testimony of Gen. Eaton and Commodore Truxton—to the latter of whom Col. Burr declared that no treason was intended, although it was charged.]

Mr Hay. I understood that this argument was to be considered merely as a reply, and not for the introduction of new matter, which might be extended to unbounded limits; and we have no power to reply.

Mr. Burr. The subject was introduced, and sufficient notice was given of it; the gentleman must have known that new matter would be produced, in order to go into a full discussion of the *whole* subject. I hope, Sir, the gentleman will be permitted to proceed without interruption.

Mr. Botts. I was only stating, Sir, that according to Mr. Hay's argument, (which he quoted,) if a civil war was *waged* in the Western Country, I ask, how could these three persons, meeting together on this island, and then sailing down the river with a design to go to a place several hundreds or thousands of miles off, make a fourth, (who was at a great distance from them) a traitor; or bring him within the construction of levying war, (as the speech of the gentleman would make us believe) let his connection with that body be "however remote, or however minute!" Now, the opinion of the Supreme Court required, that they should be marching, in a body, to the scene of action: however, we see no such assemblage or motion here, but if there had been 1000 men proceeded in a body from Blannerhasset's island towards New Orleans, and they had dissolved and dispersed an hour or a mile before they had arrived at their destination, they could not afterwards be taken up; otherwise, any innocent man whatever would be liable to be arrested for any crime whatever.

I think, Sir, I have brought forward a case that will exactly suit their definition of treason; and if they are right, any assemblage of three men can bring in a fourth, to have committed, by a monstrous imputation, the crime of treason.

Now, I will suppose that such a fourth person was on his trial before your honors: he would probably urge, that three persons cannot commit war; and that in all the cases put in all the books, no instance has been found in which less than 100 had levied war: he might urge the pages which have been read from Foster and Hale, where it is said, that the number is of no consequence, whether it be 103 or 1000, (an evident proof that 100 is the lowest number expected to levy war)—he might say that in pulling down houses in England, it would require less men, (although 100) than to levy war against the United States. To this perhaps it

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would be answered, that three men is enough to constitute an assemblage, and therefore, it was enough to make war: and again, that building boats, and fitting them up for a voyage, is enough here to be called warlike preparation. But it might be replied by him, that these boats had no warlike appearance, and these men had no arms—it would be answered, that arms are unnecessary: the assemblage is enough! But, if they had had arms, he might have urged, it was in no wise uncommon in this country for persons to carry arms, where they had the right so to do: he might have produced Tucker's Blackstone in his favor; and have urged, that a few arms would be necessary for the purpose of killing ducks. But no arms are necessary, the gentleman says, for without them there may be war; and if so without them, what must it be where there were so many. It would not, therefore, be bettering his condition, to prove that they had no arms! It is, then, in vain to say, that one man cannot make war, or that he cannot of himself commit treason, if treason can be wrested out of any transaction. Such an accused person might urge that there was *no act* of war committed. Ah, in vain would be such a plea, for it would be said, that there was an inevitable evidence of guilt, for they flew secretly and in apprehension, in the night! Nay, this would, of itself, be construed into an act of war! And I am sure, this is the only one that can be found.

But, said the gentleman yesterday, suppose we should be able to prove that Aaron Burr sent a messenger, informing the people of the danger, and advising them to fly. I suppose, that if he had not had an agency to execute this mission, but had hallooed all the way from Kentucky, that would have been denominated treason—especially if he could have sounded his voice with as much force as the shot were carried towards Orleans!

It was said in Mr. Hay's speech that there was a warlike appearance, and that war was in contemplation. It would be well for him, if he could persuade King George that it was not necessary for him to come in contact to make war upon us, but that he might stand upon his own shores and make war against the people of America. Now, although this may be an apt way with Mr. Hay, I question if it would not a little puzzle his majesty, and his ministers, to know how to conquer by this mode.

But, Sir, the prisoner, which I have supposed, would go on to urge that it was acknowledged that Gen. Wilkinson had prevented this civil war, and yet, he would say, "you have charged me in your indictment of having committed an act of war; and an *open* act of war: I therefore oppose your own declarations to your indictment." But, say the gentlemen, this was a civil war. Well, Sir, what sort of a war can be treasonable, but a civil war? What sort of magic could be made use of to transform any other war into a treasonable act of war?

Well, Sir, having got over all these difficulties, in the way the gentleman has surmounted them, the next thing to be proved, in order to fix these four persons, is to prove their *intentions* to have been treasonable. Now, Sir, I think that by the establishment of such a principal, it must forcibly strike you,

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that there would be no difficulty in proving an overt act upon every human being; for there is no man alive, who has not been, at some part or other of his life, in a public assemblage of people —and then all that remains, is, to prove that he had some criminal intention;—the assemblage is proved, and the intention may be drawn from some distant (no matter how great) declaration! Mark then: a company of people stop at Blannerhasset's island, where you see nothing but tokens of peace and friendship; as innocent an assemblage of people as the one which is now met here. Now, if this be a true definition of treason, according to the Constitution, then it must resolve itself into an examination of the inclination of the person accused; and that treason consists in the hidden thoughts of the heart, and not in that which may be exhibited to the full view of the world; and that every thing depends upon a traitorous intention, which can be only known to traitors themselves, and scarcely to them, because a very small part of the character of treason, if any, consists in the action; but the intention, (which constitutes the treason) is to be gathered alone from the assemblage!

If this definition be correct, then, I must believe that every human being is liable to be charged with treason, because every one has, at some time or other, convened with others in some assemblage: it therefore only requires an *intention*, by some means or other, to be appropriated to that assemblage, and then the crime of treason is affixed to the unfortunate victim!

I will now suppose, that this fourth person were in Court at the moment that the prosecutor was about to prove the intention of the crime attributed: he would make objection, that *intention* could not constitute an ingredient in the crime, because it could not be known: but that the Constitution requires two witnesses to the *overt act:* that if the intention did make a part of the crime, it was impossible to prove it by any witness. Why, Sir, according to the gentleman's doctrine, he would be told that the Constitution only speaks of the overt act, which could be abundantly proven; and, therefore, if he could produce one witness to prove one declaration made to day, and another of another to-morrow, that would do. In this, I refer to the evidence of Gen. Eaton, and Col. Morgan, whose testimony, I suppose, is meant to support the intention of the overt act—that is, the assemblage.

It may again be objected by this prisoner, that those declarations were made a long while since, and he might have made a thousand since: and that his purposes were perfectly innocent. But he must be answered, by this doctrine, that it was of no consequence whether they were made two years, or twenty years ago, from the time of the overt act being charged, since that was proved! So absurd is the ground which has been taken, that I am at a loss to explain it.

Thus, Sir, have we brought this crime of treason down to its perfect completion, from which it is clear, that any innocent assemblage of persons would involve *any* solitary individual in the guilt of treason, if coupled with that proof, there shall be evidence of some distant declaration having been made, however vaguely. If they ask whether this execrable doctrine could be introduced in this country, or if there be a person so vile as to

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swear falsely when a man's life is at stake, I would answer, *yes*: for I believe that a person could be sacrificed for $50. I think, for such a sum, a person might be hired to make such a declaration on oath. Jocular conversation (as, indeed, all conversation of this sort might be supposed to be,) unguarded as such always is, used in the presence of a witness, who, perhaps, to add to the error in its repetition, was, at the time of hearing it, in a state of inebriation—or, who, perhaps, did not understand, for want of talent or attention, what was meant; and what was illy understood, is worse represented.—How is a man to be armed against such evidence? What individual is there, whose character stands so high as to render him proof against this danger, when a conspiracy should have been formed against his life?—The power of the law, intended for protection, is brought to bear against him, and he falls under its mighty arm.

Is it, then, the doctrine of confession, and confession alone, that is to sustain the present prosecution? Yes, Sir: the act is itself innocent, but it can be made guilty by bringing in the former confession of the person charged. I recollect, that Judge Blackstone explained this species of evidence as the most dangerous that ever was admitted in any Court of Justice. And Justice Foster joins in reprobation of such a species of evidence, as dangerous to the defendant, because there could be no opportunity of repelling such testimony, on account of its probable privacy of communication [Mr. Botts here referred to the Comedy of "Much Ado about Nothing," to illustrate his point,] and drew the simile of the connection of Burr, Blannerhasset, and Tyler. He also proceeded to recite, and animadvert on some of the evidence of Peter Taylor, which he termed a piece of absurdity, particularly in that part where Mr. Blannerhasset spoke to him of seizing the silver mines of Mexico, &c. He asked if such evidence as this (if it could be made out) was to affect the life of any man? Or, whether evidence of this description was to be admitted, as furnishing a ground upon which *life* should depend?

Mr. Botts here requested the Court to adjourn, which was granted.

WEDNESDAY, August 26

Mr. Botts, in continuation

We now refer back again, may it please your honours, to the transactions at Blannerhasset's Island. The simpletons in Kentucky, and in the Mississippi territory, were engaged in the same business that we are now engaged in:—they were seeking for some war. They sought it in vain—they could not perceive that a collection of twenty or thirty persons, without arms, or organization, departing, even in the dead hour of the night, and leaving their wives in tears, and their families to mourn their absence, could ever be construed to be a party intending to make *war*. They entertained no presentiment of thought, for a moment, that those *mighty* preparations which were making on the island, or elsewhere, for a *bloody* and *destructive* war to be waged against *six millions* of people in the United States, and *six millions* in Mexico, was in agitation: and it remains now for us to discover, by our own magical powers, how it is possible that this

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lying party of thirty men could have invented a war, or what terrible havoc they could have made against such a foe? I ask you, Sir, what kind of a war could this have been? We have had a far better war here than they could have produced: we *have* had a war of *breath* and wry faces; and that is more than they had of carnage and blood; we have had no more than was contemplated on the island. Of the appearance of war we had as much, if not more, than they had on that famed spot, Blannerhasset's island!

Now, Sir, will this not be a subject of mockery and pastime to the European world, that a war was levied on Blannerhasset's island, and yet no one knew about it? If there were any thing, opposite in all its parts to war, it was those acts which have been singled out to charge the accused upon. One gentleman showed his taste upon this miserable subject, by transforming this mask of war and bloodshed to the battle of Culloden, which he endeavoured to assimilate to this war before the Court: he drew a strong picture of the roaring of cannon heard all over England; the horrors of bloodshed, &c. and almost transported the horrid sound and sight of that scene to this country, though 3000 miles off! Is our war really like European wars! It is true, Sir, that you are to sit here and hear debates about the warlike appearance of this little miserable party, who were obliged to fly in order to avoid being mobbed. Can you sit here with gravity, and hear speech after speech about such a war? I have called those persons who threatened to interrupt the people on that island *a mob*: what else can I call them? They were, to be sure, called by the gentlemen, the regular militia of Wood county; but, Sir, that militia could not be called out without orders from the President of the United States, or else by the Governor of Virginia, but this was not done, if it had, certainly the government would never have given orders for the destruction of Mr. Blannerhasset's property and house, as it appeared the threats of these people extended to. I heard yesterday of the extreme danger of admitting constructions upon circumstances. There may be in some extraordinary cases, a propriety in admitting a combination of acts to make out a crime, but such a doctrine cannot be applied here, for the main ingredient, the criminal nature of the assemblage does not appear, for, as far as we can perceive, it was no more criminal than the assemblage here, and not nearly so numerous. There were no other than ordinary circumstances occurred.

I hope, Sir, that when I am speaking upon the abstract question, it will not be supposed that I admit, or controvert the truth of any thing that has been said or done; but it is necessary to use some similies in order to take a true view of this bloody war.

I hold it as a just position, that a war must have existed, else no person could be charged with the commission of an act of war. In vain might one of us be assailed by the oath of any one who should swear that we had expressed a guilty intention, if nothing were done towards the execution of a guilty act. And in vain would one be taken up and tried for murder, upon the oath of any one, if no death had taken place. In vain can one

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be charged with stealing a horse, upon the oath of another, that he declared his intention to steal it, if no horse were stolen.—The murder is the *fact* that must be stated and proved, before the accuser can be permitted to go farther into other facts. But is it so under this new doctrine? No, Sir, the acts of a man must be subservient to a proof of his *intention*. Let me illustrate this more forcibly.—I say that a man is guilty of treason: I say he has levied war against the country; I say there is an assemblage of men proved; I say that arms are unnecessary: I say that, though we are carrying on a judicial proceeding, it is only intended to cover the real design, for that there is a person to be introduced, who, a long time ago, heard him express his *intention* to wage war against the United States.—Now, Sir, if we were to do so, that individual would stop us, exactly where I propose to stop this prosecution, and demand that *the act of war* should be first proved. But he is told, that, by this attempt he is desirous of robbing the transaction of its *true* character: that there was an assemblage of persons; and that there is, to the right and left, incontrovertible evidence that he had some time ago made some expressions of his purpose to levy war; and that this assemblage must have been for that purpose! This, Sir, is our situation: we are so charged, and we can say, with truth, that we are so innocently; for it is not pretended, but every thing on the island was as peaceable as it could possibly be, and free from the least vice or immorality (and surely you cannot couple with such an innocent meeting of people, any declaration of intentions made elsewhere, and at a distant period) unless you couple with it expressions of intentions, made elsewhere, or acts, which are innocent. If this be admitted, acts and intentions might be coupled to any assemblage whatever.

But, Sir, in this crime, or charge, where passion, hatred, and malignity, the worst of all vices and of all devices, should prevail (horrid machines in the hands of those in power) would you let in new and frightful doctrines of treason, to arm the hearts and hands of villains, by enabling them, with facility to obtain evidence which should bring in an innocent individual?

Let me suppose, that, to this excellent government which we now have, there should succeed persons who were disposed to assume all the power which the constitution has now vested in the Executive; and that the President of the United States should violate it in its vital parts, and assume to himself the prerogative which belongs to the citizens exclusively; and by that assumption, he is oppressing the citizens in a violent manner, and attempting, by means well provided, to continue his arbitrary sway over the public rights. Suppose, sensible of the danger to which the nation was exposed, a formidable band of chosen patriots to rise up with a view of checking such a sway; would it be difficult for a chief magistrate, who already possessed the power, having the treasury in his hands—the civil and military at his beck, and an immense patronage within his reach, to select such victims as he should think proper from among this band of patriots? No, Sir, if you are to couple the intention (which must be gathered from alledged declarations) with any meeting that might have taken place, there could be no difficulty in ma-

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king any one the victim of his vengeance: it would be the easiest thing in nature for any executive, wicked as such an one would be, to wreak his vengeance upon any person however innocent.

And was it for this, Sir, that the members of our Convention sat to form the constitution of the United States? Did they labor to leave us such a boon as this? Did they take such great pains, in relation to treason, to secure an ample protection to our citizens; and to say that there should be two witnesses to prove the overt act, and yet leave us ignorant of a true understanding of what an overt act meant, or to leave us to spend our time in a trial to search for nothing, for it must end in nothing. I say, Sir, (and I beg the gentlemen will not permit their feelings to be irritated, when I so say,) that the doctrines which have been advanced, are only fit for the Court of a Jefferies, or the nocturnal tribunals of a Robespierre. It is as far from right and justice, or from what the Convention meditated, as Heaven is from Hell, for instead of favoring the citizens, it favors the machinations of the ill-designing, who would spread death and destruction wherever government should see occasion to determine upon it.

Mr Botts here referred to what had been relied upon, by the other gentlemen in the opinions of Chase and Iredell, in Fries's trial, and in the opinion delivered by the Supreme Court; he also referred to Foster, 208; but, he said, that if those doctrines dispensed with arms, yet it could not dispense with numbers, to supply the place of arms, sufficient to accomplish the mischief. But, if this assemblage had neither arms nor numbers, they had crow-bars, axes and hoes, which might effect the mischief! But, Sir, I ask whether there were weapons or numbers, in this instance, which it can be seriously argued, could have been designed to commit hostility with a view of compleating the object. You will remember, Sir, that the opinion says, it matters not whether there be "*one hundred* or one thousand persons;" certainly then, no man, in the character of a Judge would suppose that less than *one hundred* would be a sufficient number, or that a few agricultural tools, and a few fowling pieces, could be denominated arms.

Mr. B. here read several sections from the opinion of the Supreme Court, which, he contended that, if they were understood by the gentlemen on the other side correctly, it would be impossible to reconcile them with other parts of that opinion; for if it were certain that "it was necessary there should be an actual assemblage," how can he be considered as a traitor, who should perform a part of a supposed treason, "however minute, and however *remote* from the scene of action," he may be engaged. It is truly a calamity to us—our country have been duped, and that Convention so deservedly honored, have been eulogized in vain, if this be a true definition of the result of their labours.

But, if the idea of an *assemblage* will constitute the definition of treason, I must ask how we are to come at the meaning of the word "assemblage," or what number constitutes such a meaning? If it be just to apply it to all cases where there was a war-like appearance, I pray you to apply it to the case on Blannerhasset's island, and then see how it comports with the other defen-

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tions. I suppose, Sir, it is of the same nature as the definition given by the Supreme Court to the travelling of men—"an equivocal act." Now, Sir, if it were *equivocal*, they cannot be called war, because it is impossible for there to be war without its being known. Gen. Eaton's testimony was before the Court, and they were able to judge upon that subject. They have decided what constitutes an assemblage. [See sect. 44, opinion.]

But, of how many men must these "particular bodies" consist? will three do, or does it require 20 or 30? or must there be a competent number to effect a war against the United States? Now, I understand that the travelling of individuals to a place of *partial* rendezvous, would not be an act of war, because it would not have a warlike appearance; and because it is not a direct marching to the scene of action: but, the "meeting of particular bodies of men" would constitute such an assemblage. Now, I could not understand how it could be made out that three or four unarmed men, marching to a place of rendezvous, would be called war, while a thousand armed men marching to that place of "partial" meeting, would not be considered as guilty of war!

The inference I mean to make from these observations is this—that these subjects were not argued before the Court, and therefore, that they did not intend to fix the law upon them; and their observations were merely taken from the *dictum* of the Pennsylvania Court, and consequently were not binding.

Now, sir what is marching to a place of war, but a preparing for war—and I would ask you, whether preparing for war, and making war, can be considered as one thing? I would ask whether it can be possible, that while our Convention was defining one of the greatest crimes that was ever recognized in the jurisprudence of any country, it could have supposed it possible that preparation for war would ever be called levying war.

I now come, Sir, to another proposition: which is, that the Supreme Court, whilst they were deliberating on these points, had not the subject before them; and therefore, whatever judgment they gave, it was extra judicial—or a decision upon a case not necessary to be settled before the Court. It is proper, then, for us to ask, whether this was a case necessary to be settled before the Court? was it incumbent on the Supreme Court to say, whether that was a warlike assemblage or not? Mr. Hay has admitted, that if it was not a *necessary* decision, it could not be authority. Now, as there was no question brought before them, the authority must cease, upon the admission of the gentleman himself. How could it be necessary for them to say what constituted a levying war? could it be necessary for them to say, that force should be used, or that a bare assemblage of men should be considered an act of war upon the depositions of gen. Wilkinson and gen. Eaton? They might have proved that there was, or was not war intended, but surely they proved nothing about any assemblage! the question was not before the Court. Then, Sir, if there was no assemblage proved before the Court, nor any argument used upon it, how could it be necessary that they should enquire into the facts of an assemblage? If the subject had been judicially before them, they were about to do an act that should bind future ages, and affect the lives of thousands. Nay, the very existence

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of the government itself would have hung on their subject of deliberation. At least then they would have called for the assistance of the bar. And yet, I aver it, from authority, that the question of what constitutes an assemblage was not moved, or debated, at the bar. I now ask your honors, whether you would sit down and deliberately decide upon any supposed question not before you, in a case not called for, nor argued? I ask again, whether, if it had been their (the Supreme Court's) wishes to have settled so important a point, they would not have wished, and called for the united labors of the bar to assist them? yes, I will say, that the Court would have pursued that course.

I think I may venture another surmise upon a point of so much importance. The doctrine of treason in this country was complicated and undefined in some respects, and no subject of consideration could be more unwelcome to legal minds, for they had not taken it into consideration. [I believe that your honors will accord with me in this point, and I know that I am speaking to your judgment.] The judgment of the Supreme Court was made without a case before them, and therefore, turning over page after page of English books, would illy qualify you to decide on the nature of an overt act of war in this country, where there had been no war committed. Sir, there never has been a case yet in this country, where such a subject has necessarily been taken up; because, there has been no case of treason but where there was war. The cases in Pennsylvania were where there was direct hostility commenced, and therefore, any decisions made upon them cannot be applicable to a case where there was no hostility. English authorities are as little applicable. In England, there are two great classes of treason—the one relates to the mind; the other relates to the actions. The one is *compassing* the death of the King; and the other is levying war against the realm. And yet, although these treasons are so distinct in their nature and so contrary in their description, even the elementary writers (Hawkins and others) have often confounded cases of compassing the King's death with cases of levying war, in their defining the nature of treason; and this mixture of cases of a very different nature, which has produced an ubiquity of doctrine, has found its way into our Courts, and produced error upon error. Thus the Judges in Pennsylvania, and the Judges of the Supreme Court might have been mistaken: and it is impossible to obtain a well matured decision, except there should have been some case or question and argument to aid the decision.

Mr. M'Rae, and Mr. Wirt have both of them stated, that they were at a loss to know how the Pennsylvania cases, and the opinion of the Supreme Court, could be called extra-judicial: now, according to the rule furnished them at their birth, it becomes them to shew that the question was a *necessary* one: the *onus probandi* then rests on them, and, unless they prove that the Court had the subject *legally* before them, it must follow, that it was an extra-judicial opinion. I am well convinced, Sir, that justice claims of you, to see that the doctrine of the Supreme Court ought to be *corrected* and *qualified*, for there are expressions in that opinion which must satisfy us that it was not in a ripe state for promulgation, because it was not decided

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upon any case then before the Court, and because there was not the aid of counsel to produce an argument. The *circumstance* under which that opinion was given, is a question of the greatest importance in viewing the decision. See Foster p. 36. 37.

The cases which had occurred in Pennsylvania were, avowedly, the governing principle upon which the opinion of the Supreme Court was formed, but, perhaps they did not advert to the circumstances of that case: they took it for granted that the question there had been maturely discussed; and settled by a silent decision. But there was no such question before that bar, and no argument was held on the doctrine upon which the Supreme Court decided, either on one side or the other. None of these circumstances being adverted to, we are at liberty, (in order to show that it is not applicable here) to trace the *dicta* of Pennsylvania to its source of rottenness. I ask the examination into that doctrine, and, Sir, if you should be warned by the injunctions of rectitude, which I am sure you will be, and that you will discover that this doctrine crept into the minds of the Supreme Court, without due examinations, I ask you whether it is to go down with you? Who are the gentlemen that now urge the authority of the Pennsylvania decisions? Why, they are those who joined in the general outery against the doctrines that prevailed in Frie's trial; and gentlemen who were of *their* politics in this country, at *that* time, rose in a general mass of rebellion against the doctrine; they considered them so highly obnoxious, as to declare, that both parties ought to condemn their boldness. And, indeed, both parties did condemn their judgment. Mr. Lewis and Mr. Dallas, gentlemen both well learned in the Law, the latter of whom was of the same political tenets with the gentlemen who conduct this prosecution, hooted at the doctrine which had prevailed: they were so dissatisfied with it, as to declare the Court had done wrong, and to withdraw from the defence of their unhapp client. And upon these very doctrines and results, the judge was impeached. After all this, these doctrines are quoted by the gentlemen themselves who so lately declaimed against them! But viewing the prospective horrors to which such a doctrine would inevitably lead, when circumstances should call for it, Judge Tucker critically examines this immaculate doctrine of Chase in Pensylvania, and enters into the most laboured, extensive, and learned research of it that ever has been made; and expressing its consequences, if ever it should be introduced, has exposed it to your just ridicule.

If then it were true, that there was no point before the Court to admit of an argument: if it be true that the gentlemen who delivered their opinions before that Court, had never studied its various consequences, or the opinions of the English bar on the subject, what sacredness can there be attached to their opinions. This must be the impression of the members of that Court themselves.

I have said that those parts of the opinion of the Supreme Court relied upon, and which do, in express words engraft themselves upon parts of the opinion of the Pennsylvania Court—that those parts are utterly irreconcileable with other parts of the

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opinion of the Supreme Court. There is a general, and undefined mode of expression, which must support the ideas that I have advanced upon that opinion.—When you speak of an assemblage, you do not define what an assemblage means: you do not say whether it should exhibit a warlike appearance or not. It must, therefore, be controuled by other parts of the opinion which do go to explain. I will barely allude to those parts (at present) which are inconsistent. Judge Chase, Iredell, and yourself, thought that an overt was not an ordinary act, but an extra-ordinary act—one that could not be done in secret, but that must be done in the face of the world, and which would admit of a number of witnesses. Now, if the crime consisted in intention, or in any sort of an assemblage common to all men, it consequently could not be so denominated. The intention, the assemblage, and the act must be combined. Now the Supreme Court declared that *actual* force was necessary: the Circuit Court of Pennsylvania, in two instances, declared the same. Mr. Lewis and Mr. Dallas, whose concessions have been quoted upon us, contended for the contrary, but they were met by Mr. Sitgreaves, and Mr. Rawle, who contended that *actual force* must be used, to constitute the *act* of war. [I shall presently come to those parts of the opinion of the Court, and the concessions of the counsel, which will prove these facts.]

The act of Congress declares that, to every overt act, there shall be two witnesses—and not merely to any *overt act*, but to any act of *treason*—not only the act, but the character of that act. Not only prove that a treason has been committed, but prove the identical acts of that treason—not only to prove the act of war, but to prove that it was an act, and that it was an act of war. See p. 27, 28, on the motion to commit: the opinion of the Supreme Court also,—and Iredell's charge in the trial of Fries. In the motion to commit, I also understand, that actual war is opposed to constructive levying of war; and that every thing that relates to the question of force, ought to be separated from the question of declaration or intention, because that must be forced *constructively* into the definition. Now, if it be the case that there is a manifest and avowed difference between an *actual* and *constructive* levying of war, every thing that relates to the question of *force*, would be understood. See sect. 12, of the opinion Supreme Court: from which it appears, that force must *actually* used. See p. 197, Fries's Trial. See also Kelyng, 78, 79, in the case of a special verdict. These authorities, Sir, I close with one from yourself; and that is too unequivocal, plain, and direct to be misunderstood. "War can only be levied by the employment of *actual force*." Now you can best understand the opinion of the Supreme Court, and the reasons why that opinion was delivered; and you alone are able to explain those parts which may appear doubtful. Sir, you have explained those parts of it, and delivered a solemn opinion upon an argument on the point, wherein you declared that actual force was necessary.

Now, who is it that places the most confidence in the solemn decision of the Supreme Court, those gentlemen, or we? Do they not expressly say, that force is not necessary? whilst you say, in express terms that it is necessary? We then, in our de-

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fence, are put upon showing wherein that opinion (which we contend, in itself, ought not to be considered as authority) is correct or incorrect: whilst they, without examination, build upon its authority!

What was the case supposed by Mr. Hay! Why, that of a formidable army marching to our capitol, and affrighting the people, so as to enable them to take possession of every thing. Why, Sir, this is *potential* force, but there is no *actual* force required to obtain the accomplishment of such an object: and *actual* force must ever be distinguished from *constructive* force. But, Sir, I never did think it necessary to pretend that that would not be war, because authorities would not support such a doctrine, and because the authority of the Chief Justice, and of the Supreme Court, justly have declared upon it.

Again, Sir, both of the gentlemen have admitted that it is necessary to qualify the opinion of the Supreme Court. One of them says the opinion was incorrect, because it was said, that if the people dispersed before the object which they had declared, and had in view, was committed, it could not be *war*. Another objects to it because you say that every unlawful assemblage would not be an act of war. Now, Sir, all that we want of the gentlemen is, that when they look to particular words in the opinion, they will look to other parts of it, in order to explain the reason why those words were used.

You farther say, Sir, in that opinion that the mere enlistment of men is not levying war; that troops must be embodied: that it is not sufficient for men merely to assemble, but that they must be formed into *troops* and be *embodied*, and *organized*. Now, apply this to the generality of the word "assemblage," and then see whether any qualification can fit it to this case, without it has the main ingredient of actual hostility attached to it.

You say that levying an armed body of 7000 troops would not be an action of war, in itself: that troops may be levied, without war being levied, (see opinion, sect. 40, 41.) It is true that the worthy gentleman who spoke yesterday, with great ingenuity said that *war* did not mean *war*, but that *war* meant making of *soldiers*. He also says, that the intention is, ordinarily, the evidence of the guilt, and that, with a proof of the evil intention, some trifling circumstance might be transformed into guilt—such, for instance, as the making of soldiers. He read from a dictionary to prove that levying war, was nothing else but levying soldiers, and (consequently) that levying one soldier was levying war! Now, I think, it syllogistically follows, that "levying war," within the Constitution of the United States, is making a *soldier*, and that war is only a substitute for enlisting a soldier!

Now, Sir, if we read another dictionary on the subject, we shall find, that the words, to "levy war" mean, *to make war*, or to *raise war*. (Ash.) I should have thought, indeed, that "common sense" would have put this question to rest; and that when conversation was held about "levying war" it would not be supposed to mean levying soldiers: if it had been so, I should have supposed that common parlance would have pointed out an evident distinction between the two. I should suppose that levying

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war could not take place until war actually existed; and that levying of soldiers must pre-exist to the state of levying war.

The opinions of the American Judges are found to combat those of the gentlemen on the other side, as to the flexibility of the terms "levying war." The opinion of the Supreme Court is, that treason shall not be extended to doubtful cases. The opinions of Judges Iredell and Chase, in Fries's trial; and that of the Chief Justice on the motion to commit, all corroborate the propriety of that position. I never did expect that there would be occasion in the United States, for a labored argument to take place to guard against the dreadful calamity of *constructive treason*; because I thought that there was such a settled detestation of it fixed in the breast of the people of America, that it was universally detestable, and that it would hardly be advanced by gentlemen, less learned than the gentlemen of the other side, in the danger to which it must inevitably lead in the United States. A great writer (Montisquieu), from his own experience, says, that the doctrine of "constructive treason," is sufficient to make any government degenerate into arbitrary power. Sp. L. b. 12, ch. vii. and 4 Bl. 75. But the danger growing out of the tyranny which constructive treason may generate, even under the government of England, and a concentration of the mischiefs attendant upon it, is exhibited in the melancholy catastrophe of Lord Stafford, where those very arguments are used which the gentlemen have indulged themselves in this prosecution to use. See 5 Hume's England, p. 31. ch. 54; Ray. 408; 3 St. Tr. 101. There were many things to be sure in that case, which did not resemble this; but there are many which do; and wherever the resemblance is, your Honour's can apply it. I will only observe, that he fell a victim to the constructive meaning of the common law, and that if this constructive doctrine were to be introduced here, Colonel Burr might suffer by it also: for it is equally dangerous here to what it has been in England, if circumstances and times were similar. I shall not weary the patience of the Court by applying the cases where they are analogous.

There are two or three definitions of *war* to be found in Puffendorff, p. 8; and 1 Inst. 249, "when, by invasion, or rebellion, the course of justice is stopped, then it should be adjudged a time of war." Now, if you test levying of war, Sir, by this definition, you must naturally enquire, when was the course of justice stopped? Judge Cranch says, that the most comprehensive definition of "levying war," requires, as an ingredient, the assemblage of men, ready to act; and with intent to do some treasonable act; and armed in a warlike manner: or else, in such numbers as to supercede the necessity of arms—[opinion in cases of Bolman and Swartwout.] There is nothing remarkable in this opinion, that could favor the other side, but the words "ready to act;" but, surely, the Judge strongly presents the idea that their purposes must be determined upon, and they must be in action towards the execution of them. It therefore follows, that such a meeting as was on Blannerhasset's island, purposing to go against New Orleans, must be an absurdity.

Referring to English cases, Sir, I would ask if there were ever

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one person prosecuted for *levying war*, where that person was not found in the assemblage, "ready to act?" The State Trials do not exhibit a case of the kind. In the rebellion of 1745, there were instances of persons being prosecuted for overt acts at different places: but it was invariably found, that when the evidence did not come up to full proof at that place, (either by actual force or intimidation), that the case went off on some other of the counts; or judgment was given for the prisoner.

Now, as to the indictment. When this jury bring in their verdict, if guilty, it must be in the manner specified in the indictment. The jury must speak jesuistically, or falsely, unless they find every thing stated in the indictment to be true: it is necessary that the indictment should state the act of treason from its commencement to its consummation. Any indictment that charges an overt act, and yet omits the circumstances attending that act, would be vicious, and could not be supported. And can all this be mere form? Must it not be proved in matter of substance as well as form? What is the substance, but the acts done? I ask whether a jury can give a verdict upon any indictment that is equivocal in its meaning? I ask whether it is consistent with reason, that an indictment should charge a treason in making preparation for war, and yet not charge an act of war? Need I refer you to precedents, Sir? If you look into any indictment on record, you will find the words "prepared, obtained, and levied war," &c. All these things are matters of substance and *must* be proven—it should state that the war *was* made.

We now come back, may it please your honour's, to the Constitution, and here we say that we have evidence sufficient to prove, that the Convention had some meaning in their work of controling the national legislature from extending the doctrine of treason, either constructively or positively: they also had a great object in view in controling the judiciary. Two witnesses were made necessary to the production of a verdict for levying war. Now these words, "*levying war*," were used in the Constitution; and I will venture to say, that no words in the English language are better understood, generally, either by the highest or the lowest. The question then seems to recur to this: whether the Convention meant to adopt the word war in its ordinary acceptation, or whether it meant to seek its import in England, under the bloody books of Jeffries and Coke's judicial reigns. I shall rejoice to contend, that our convention meant to refer it to the ordinary acceptation—its popular, eligible, and unequivocal sense. The legal sense of a word is the hardest thing in the world to be sought for. According to the English books, it means every thing, and any thing. It opens the best blood that ever ran in the veins of England; and it closes the veins of the veriest wretches (Jeffries, &c.) whose blood ought long before to have run. Thus, the conflicting times and men have wrenched the word "*war*," to answer any and every purpose. I, therefore, speak it with confidence, that the Convention never could have meant a construction to be placed on a word which they used, that has been so often drenched in the best of blood. Therefore, if the technical sense must be referred to, it must be referred to *in toto*, and every person who has done like Lady Lisle, must be a traitor!

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But, Sir, it is said that we are robbing the jury of their rights —that if you do not let this evidence go to them, you take the case out of their hands—that it is a question of fact and of law; and that, therefore, if you take to yourselves the whole question, you must be guilty of oppression.

I am really sorry to hear such a laboured attempt to infuse jealousy into the minds of the jury. I indulge myself with the thought that this jury is not prepared for a cannibal feast; and that they are not quite so hungry for human life. If they should thirst for blood, (which I have not the most distant fear of,) the moment that they are about to put it to their lips, you will snatch it from them. No, Sir; the jury need not be ashamed, nor need the counsel, that you are about removing the privilege of jury, and that the time of a blood-thirsty Jeffries is returning!

Your own decision has been quoted, Sir: it is reminded to you that you said, that this was a question which comprehended law and fact You never said any thing more correct in your life: treason must necessarily comprehend *law* and *fact*. Whenever a judge shall assume to himself the right to decide where a fact is sufficiently proved upon good evidence, he goes no further than his duty, whatever apprehensions the gentlemen may figure out to you of the fury of some future Jeffries. It is most assuredly the province of the Judge to guard the prisoner from improper evidence at all times. When we prefer the question of the sufficiency of evidence to the court, how do we dispose of the question of fact? Why, Sir, we concede the facts as they are made out, *(ex parte)*, by their own testimony, whether it be true or false: we are constrained to admit the verity of the evidence, whatever it might be. That being admitted, we stand upon precisely the same ground as a *demurrer* or *deed*. A deed cannot be doubted; the evidence is before the court, and it cannot be varied. The court can decide upon the evidence of a deed, not only because it is written, but because it is intelligible. Now, it can make no difference as to the facts, whether it be in writing, or in sound of words, if the court hear both, and both are admitted to go to the court by both parties. Again, in civil cases, when testimony is given, the plaintiff may, whenever he chooses, demur to it; but he must then admit of the facts stated in open court, whether they do or do not amount to what they are stated to be. In criminal cases it is the same. Upon what principles can you draw the distinction?

And wherein can be the injury of it? I never shall contend that, after you have decided the question, the jury may not go out, and, if they please, find in opposition to you; and I never shall contend that you have a right to give an opinion upon all the evidence: but when there is dependant evidence, the sufficiency of that dependant evidence must be decided upon by the court, whenever an appeal is made to your decision. They are not to decide upon the weight of the testimony, but the import of it, and the effect of that import!

What argument would the gentleman use? Why that you are about to take the case from the jury, or, if you do not take the whole case, that you will take a part of the case from them; and that the jury must judge whether the connection between the

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parties was sufficiently made out or not. See 1. East, 96, 97. That position is declared with reference to authorities which cannot be denied. See also, p. 66, 67, same book. It is not pretended to be denied, nor did I suppose that any body would deny that the question of treason or no treason, war or no war, was to be decided by the jury, upon the facts; that is properly the office of the jury to decide. But wherever the law of the case should become a question, and the facts are combined with the legal question, then it is the office of the judge, and of him alone to decide upon that branch of the case, whenever the accused shall submit it; and whenever he shall submit his case upon the law, he is under the necessity of admitting that all the evidence is true; and it would leave it in the same situation as though the jury were to believe all the facts to be true and submit the law of the case to the court. If it were not at sometimes the office of the court to decide, verdicts in different states and at different periods would be as diversified as it is possible for them to be made: and there would be no sort of uniformity, even in similar cases. Mr. Wickham has put a very strong and apt case—the act of a person who is an agent and binds his principal. Perhaps it is in a receipt, an obligation, or a deed. The person who attempts the introduction of this testimony is stopped at the threshold to enquire whether it was a proper delegation of powers to the agent. Now, Mr. Wirt admits the propriety of this, but he says, that the delegation of authority is to be judged of by the same jury as is to decide the case. Now, sir, this is attended with inconvenience and nullity: the court directs the party to prove that there was an actual delegation of authority; instead of this, he goes on to the mockery of calling witnesses for another purpose; and then he says this is good proof. What situation is such a person in? Why, he is left where he was, exactly, and nothing is done. Instances are so common in which the court interrupt the party from producing dependant evidence until the principal evidence is given, that no author thinks it worth while to record any thing about it, except there are other things combined in the case; hence it is, that we find so very little said: but reason and results will prove the inevitable necessity of the practice. Is it not invariably necessary that where a tract of land is in suit, that the title to that land should be proved before the boundary need be set out? We have properly authenticated and daily experience of this sort of cases.

I believe there is a case to be furnished from the council chamber which is infinitely more strong than that which has been mentioned. [Mr. Botts here referred to the case of Gatewood. The prisoner was indicted for murder: the deceased had come to his house, and had abused his wife and daughters so much that he determined upon his death, and kept his gun loaded. The next day he came, and immediately the prisoner shot him whilst on his horse: the deceased was a vagabond, the prisoner was a person of respectability. It was in that case argued by the prosecutor that there was malice aforethought. This was a question of law that the court must judge of—whether there was sufficient time for the passions to subside and cool, or not, before the actual homicide was committed. Mac Nally, 546 to 549, was read on the

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subject, to prove that the court were judges of the malice aforethought in all cases of murder. Here the fact was proved and reference was made to the court, whose province it was to decide upon that point. Something was said about usurpation, but it was not admitted to be an usurpation, the fact being first admitted.

It is really strange, sir, that we should be obliged to pursue the question of what is war, since the books we have quoted will sufficiently develope that question. The books too, are full of cases to show the universal principle, that when a statute defines any offence, the construction of that statute belongs to the court, and that the question of law also is exclusively the province of the court to decide. See Leach, 422, 430. 2 Strange, 1127. 2 Hawk, 321. 2 Strange, 497, 498. 2 Burrowes, 421. 2 Strange 686. Here it appears that all persons addicted to *profane swearing* should be punished; now it was the business of the court to determine whether the use of certain words was profane swearing or not. So with respect to unlawful *gaming*. The court were to decide upon the crime.

What is the situation of this particular case? The witnesses have deposed to certain facts: there can be no doubt upon those facts, because we admit them; therefore, all that is now necessary, is to apply the law to those facts. The question is thus left naked to the court, who must necessarily decide upon the question of law. Then, sir, I ask, what is taken from the jury? After you have decided the question, I ask whether the jury cannot reverse your opinion? Although the jury may ask your instruction, cannot they find in opposition to it? But, sir, was it ever said in a court of justice before, *that* because the jury required a question of law to be decided by the court, that therefore the case was taken out of the hands of the jury? In the case of Fredericksburgh, where all the parties were extremely tenacious of their constitutional rights, the court did decide upon the question, which was accorded in, willingly by the prosecutor and the jury: they considered it of the last importance, to settle the point agreeably to law; because they knew that it would be called up as a precedent. But though the case was decidedly against the prisoner, the court, jury and bar, joined in recommending to mercy, under the expectation that mercy would be extended.

A great deal of tinselled remark and gaudy declamation have been used on this occasion, by both the gentlemen who have spoken. I do not mean to apply harsh and improper expressions: the gentlemen were doing their duty, according to the best of their judgement, but they were actuated by a strange persecuting bigotry, into which they were beguiled, and which they have evinced throughout the prosecution. I do not ascribe this to any want of humanity, patriotism or virtue; but I ascribe it to the situation in which they have been placed as counsel, and to the influence of their zeal, begotten, as it is, from opposition; and growing, as it has grown, out of a spirit of party, and mistaken circumstances. What is their language? "Why should we not be permitted to hear the evidence? why not let the whole case come out? why should not the country be gratified with a knowledge of the whole transaction? whether the evidence be perjured, useless, or whatever, why will you not submit to a

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little longer imprisonment to give this gratification !" See 4 St. Tr. p. 177 Sir John Hawles's observations in College's case. The Attorney General said that if the prisoner was innocent, it was no matter whether this auxiliary evidence be introduced or not, for that his innocence would appear to the court; and that the court could take the course to discriminate what was, or what was not regular testimony, be it what it would; and therefore the whole of the testimony should go to the jury. There we see that the Court were judges of the evidence.

But, Sir, in this case, we do not want to exclude the evidence from public view; we know that, by our motion, we are prevented from giving exculpatory evidence, that would clear Col. Burr; but we do confess that we want to save the time and trouble of hearing 140 witnesses. It is not the wish of Col. Burr, Sir, to combat news-paper publications by producing testimony, (which he has here present,) some of whom would disclose false oaths and false evidence in abundance; but he does not wish to take up the time of the Court, although he knows the correctness of his ground.

I thought, and I said, that constructive Treason in any government would be dangerous—it was said, and affirmed that, though constructive treason would be dangerous in Europe, it could not be so in the U. States, because the people here are sovereign and they certainly could not destroy their own liberty by admitting improper construction to laws of their own making. Of the truth of this position, I am dubious.

I never can conceive myself to be at liberty to speak slenderly of characters, until those characters should come out to the world as worthy of ignominy. I cannot be guilty of the injustice of saying, that a witness has perjured himself, until I first exhibit it to the jury in such a light as to make it evident. I shall, however, go into some examination of the evidence that has been given, from which you will see whether you can make a treason from this circumstance, without the inevitable denomination of constructive.

I will follow the example which has been furnished to me from the other side: those gentlemen have supposed cases to exhibit their argument to the court, I will also suppose a case; and if in the examination of this subject, I shall not exactly fit this case; or if I should speak of what bad and vicious characters may do, in after times, to vent their malignity, agreeably to the doctrine which has been advanced by the prosecution—characters and cases to which I will not now liken this before the court, may be brought forward, without any immediate allusion.

[Mr. Botts here went into a lengthy view, in the *abstract*, of what damages might be sustained to individuals from a *construction* of treason, or any other crime, to suit the will and wishes of a corrupt administration, not referring to persons or times, but consequences, when reason and justice were left out of courts, and passion envy or malice substituted: he mentioned the evils which might accrue from the suspension of the writ of habeus corpus, and what corrupt judges might do, if they followed the example of former corrupt judges in England. He quoted De Lolme, 110, and the deaths of Socrates, Aristides, Byng, &c. to

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illustrate his position, that when rulers submitted to popular fury, and the clamours of the sovereign people, no individual was safe. He observed, that the importance of this case had extended the necessity of abstract reasoning far beyond any limits which he had prescribed to himself, and he hoped the good nature of the court would afford an excuse for his having so long troubled them upon what might not have appeared so important.

He continued in the application—Will you charge Col. Burr with an overt act of treason? I suppose that the gentlemen will not pretend to charge him with an overt act, where there was no overt act committed: and if it were not committed where it is charged, it is the same, as to this prosecution, as though it had been committed no where. Therefore, if it were not committed at that place, it is not before the court and jury, because the indictment specifies a place. Throgmorton's case was referred to, and some inferences were deduced, but it is a pity that the gentleman had not read a little farther in that history, and he would have discovered, that his question and inferences would not have answered his purpose.

But, sir, *we* have three attorney generals, &c. engaged in behalf of the accused. Now I should suppose that when *war* was the subject, one good brigadier general and lieutenant governor would be equal to four attorney generals. I must confess, however, that in this affair of war, the gentlemen engaged on the side of the prosecution have not shewed their martial prowess: that, however, does not arise from a want of power, but either from their want of knowledge, or the badness of their cause.

But, we have three times the number of counsel! Now, sir, what have they? The laws of this country know of but one to be engaged in a criminal prosecution, whilst there are always two allowed to the defendant. Since, therefore, the public have exceeded their number, (and that upon public expence) how can they bring forward a charge against us, whose only interest it is to defend our innocence.

But Mr. Wickham has been charged with advocating the principles of common law at one time, and of resisting its introduction at another time. Now, how is it with the gentlemen? They say that when words of legal meaning are used, you must apply to the source from whence these ideas sprang; and therefore, from that source you must collect your opinion. But what will you find there? Why, sir, you will discover that the judges were of different opinions, and that what a majority of them said was, irrevocably, law. And what inference can we draw? Why the authorities are taken from old mustly law books, whose contents comprize technical law terms, and whose meaning is inexplicable. Why did not the gentlemen at once come out and declare that this *technical* import was to be applied to the constitution of the United States, for a definition of what was levying war: for really their argument referred to the *very* doctrines which they have condemned in us; and which we think equally dangerous that they would have us believe?

I hope Mr. M'Rae and Mr. Wirt will not take any thing that I say amiss: I wish to pay the utmost respect to my brethren at the bar and to the court; I mean no offence to either, and hope no

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offence will be taken, if a word should be dropped which might be supposed amiss. Let this be my general apology. I have frequently done as Dr. Franklin did, when he said grace at the table over the meat, which he intended should last all the year. So I must apply my apology.

But, sir, I cannot avoid complaining of so much time having been wasted on the abstract question in adulation of the President and General Wilkinson. Now what can be expected from adulation but to furnish a ground for investigation of character? And particularly so, as it affected the guilt of the accused. I should not complain of their adulation upon any characters, if it did not affect the accusation, even though they were to speak two or three hours more in strains of adulation. They complain dreadfully of us, that we turn *accusers*, instead of defending Col. Burr; and suppose a reversal of the natural order of things, as though we were, in all respects wrong, and the prosecutor in all respects right. This opinion has been always common to public prosecutors. In the prosecutions in Ireland, we see a Sir Charles Asgill, an O'Brian, and a Syrr, who were all public accusers, and who vindicated the propriety of their conduct. Those persons though, were charged by the accused, and proved to be guilty. It was not, even then, so miraculous a thing in a prosecution, to accuse those who had so falsely accused a prisoner. And therefore the gentlemen must excuse us if we mention anything respecting witnesses who may be brought against us.

A gentleman has complained that the government has been unnecessarily assailed respecting this prosecution. It is true that some gentlemen engaged (differing from me on political subjects) have, in the honesty and openness of their hearts expressed themselves in opinions which other gentlemen may suppose to be wrong, as to the executive: but it is one of our privileges, as Mr. Jefferson has expressed it, that there is perfect toleration in the U. States to speak our thoughts, and certainly then, there can be no evil in expressing opinions in a court of justice, where an important case is pending.

Mr. Wirt began with very fair professions, that as he did not entertain any rancour in his heart against the accused, so, no inducements whatever could excite him to enter into any improper procedure in the case. I really could wish that the gentlemen would not make professions; but, if they will make professions, I hope it will be considered that they make them in their official character, and not as men in common life would speak. In this fictitious character they are bound to support the principles which they now avow: but they are beguiled into the case, which I am sure, had they observed it, they would have abhorred, if they had looked into the transactions with proper eyes. Sir, the gentlemen are subject to infirmity—they have infirmity; and if they depend upon what they think to be justifiable doctrine, they will find it directly in contradiction to their profession; if they persist in it, it may tend to increase their delusion, but it cannot answer them any substantial purpose.

I must give my friend, (Mr. Wirt) if I may be permitted to call him so, the highest credit for his elegant and intelligent speech; but I could not but observe some traces of a spirit of

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bigotry in it. I will illustrate it. When he agreed that we must necessarily admit the truth of every thing said in evidence in opposition to us, we knew that we were obliged to submit ourselves to the mercy of those gentlemen, in a great degree: for that by it, they could derive information enough to meet every thing we could say on the subject of testimony. We did not however think that Mr. Wirt would have taken any unreasonable and unfair advantage of the power which we gave to him: we supposed that he would follow the footsteps of the gentleman who preceded him. He and Mr. Hay did at first declare, that it was their purpose to begin and proceed in the most "*lucid*" manner—first at Washington; thence by regular steps, to Blannerhasset's Island; and thence to New-Orleans. Mr. Hay was also good enough to acknowledge another thing, and that is, that none of those persons who went down the river with Mr. Blannerhasset or Col. Burr, knew for what purpose they were going; but that they were put off with promises of information at the mouth of Cumberland; and, in fine, that they were never told. Now, it will appear extremely difficult indeed to talk of a man being enlisted, before he arrived at Blannerhasset's Island, when they did not know what they were going about, and when they had no officer to govern them; and all that you can discover about their organization, is from mere conjecture! Mr. Mc Rae supposes himself to be at liberty to suppose, that those men who were at Blannerhasset's Island were enlisted; but, whatever he might be at liberty to suppose, I will say that he cannot prove it. Now on the contrary, Mr Wirt supposes himself to be invested with the character of *counsel*, and speaks accordingly; but does not speak as a *man*; he does not make those tacit acknowledgements made by the other gentleman.

Mr. *Wirt*. I understood this motion to be, to exclude all farther evidence. A part of the evidence meant to be introduced is, to prove how these men were procured in Pennsylvania; and that they did consider, and call themselves, "Burr's men;" and that he did take command of them, as his men, at the mouth of Cumberland: I believe that all this, at least, will be proven.

Mr. *Burr*. Whatever the gentlemen have supposed, it must, for the moment, be believed that they could prove. Whether they have extended their suppositions too largely or not, cannot at this time be a question, since the argument *must* proceed upon that basis. The gentlemen were not correct in their mode, let their imaginations wander wherever they please. But, let them allege, with however much confidence, still they cannot think this a proper question for the jury.

Mr. *Wirt*. I should not have interrupted, if the gentleman had not questioned my candour and veracity as a gentleman!—He says that these are things that I said I could prove, when I knew that I could not prove it. Does he mean to implicate my honour as a gentleman of veracity?

Mr. *Botts*. I will answer the gentleman. I always say and do what I think is right, regardless of consequences. I have no hesitation in declaring that every word I said was correct; but I had no reference whatever to the integrity of that gentleman; I can attribute nothing dishonourable to the gentleman: he con-

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tended that the bare act of enlisting soldiers was sufficient to prove the intention; but, if that be the case, what is to become of the opinion of the Supreme Court, so much relied on? That opinion says, that an assemblage should be formed, in order to compose an act of treason. Now, in England, where *intention* constitutes the crime of treason, any thing may be called an overt act: but, where the crime does not consist barely in intention, but of an act of war, there any act cannot be construed to an act of treason.

Again. Mr. Hay has said that the potential force used on Blannerhasset's island, might have been brought to operate either in Wood County, or at New Orleans. Now, it could not be brought to operate on Wood, because no act of war was, or could have been intended there; and whatever might have been intended against New Orleans, was yet *but intention*, which cannot be construed to be an *act* of war. Potential force then could not make an overt act of war.

But, Sir, no accessorial agent can be convicted, until there shall be produced in Court a record of the conviction, or outlawry, of the principal.—Gilbert 863, 864. The reason is clear; because the principal might have an opportunity to prove his own innocence of an act charged, which an accessary could not do. No man can be supposed to be able to bring an act in so clear a light, or do so much justice to himself, as he who was engaged primarily in that act. Mr. Wirt has admitted that, if Mr. Burr is not a *principal actor* in this war, he cannot be convicted till the record of conviction of the principal shall be produced. But, if he be an actor, whether he be a principal or an accessorial actor, where was he an actor? Why, certainly, where the act was done, and where *he* acted. Thus, taking the gentleman in his own way, it is impossible that Col. Burr could be tried in Virginia for any act, because he cannot be proved to have acted either as principal or accessary in that State.

But, how does the gentleman make him out to be an actor?—Why, he says, that Mr. Burr is, to these people, as the Sun in the Planetary system: that he afforded them both life and light! But, if we grant all this—he says more: he has drawn a most frightful picture of Mr. Burr's guilt: but what does this hideous exhibition come to? Why, whether a man be a principal or an accessary, does not depend upon the moral turpitude of the offence; but it depends upon the class of the acts which the definition of the offence shall produce. Upon the doctrine of the gentleman, a man may be considered as the procurer of a murder; because, by bringing up his child, he may be inattentive to his morals, by which he may be introduced to the temptation.—So, a person who may teach the pugilistic art, and by some blow, the party might destroy the life of his antagonist. Gambling may also lead to serious consequences, by the desperation to which it leads. There can be no doubt but the person who fosters the seeds of these vices, is accessorial to all the consequences; but can he be termed a principal? There can be no sort of comparison in the guilt of him, and of the person who does the act: there could be no guilt in the agent: but, we know that in law, him who did the act would have been considered as the

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principal, and him only;—others may be considered as accessorial agents, but they may be so from their situation or connection with their superiors; such as writing a traitorous letter, &c. by direction of a principal.

Again, Sir. No evidence can be given on this indictment, charging the accused as an actor, respecting accessorial connection; because it is always necessary to inform the defendant of the point which he is to come prepared to controvert.—2 Washington's Report, 179; Call Mss. 104; 2 Hawk. 320, sec. 57; Mervin; Lord Audley; Earl Castlehaven's case, 1 St. Tr. The last case I would not mention, but that the charge was special: the persons who were aiders and assisters were charged *participes criminis* in the same fact.—192 M'Nally; Algernon Sidney's case, Cr. Ca. 448, 449.

Chief Justice. Is it stated as necessary?

Mr. Botts. I believe not, Sir; but the consequences attendant will shew the propriety of my argument. By way of illustration, I will suppose, that a letter had been written 3000 miles off; that letter may make a man an accessorial agent in treason; but ought not the agency to be expressed in the indictment that should, at some future time, be exhibited against him? Now, if he is indicted generally for treason, how can he be prepared to answer as to the writing of that letter, or whether he were or were not present at any particular time? He might possibly be able to prove that the letter was not of his writing, nor within his knowledge: at least he was not present, and cannot be a principal at 3000 miles distance at the time.

Again. An accessorial agent in war, is not punishable as a principal traitor in the United States. For the correctness of this position, I refer to the Constitution, which requires the *levying* of war, before a man can be a traitor at all: and, upon plain reason, the meaning is, that no one can be said to levy war, who is not an *actor* in that war: for "levying war" is *an act*. *Procuring* war to be levied, is a different offence from levying war. In England, the acts respecting treason were engrafted upon the principle of common law: they restrained, but did not enlarge the offence. The statutes then did not originate the offence, but defined and reduced it from a source already originated. Treason there consists in the principal acting, and in the accessorial acts of others; but it is so multifarious, that no statutes have yet been passed to destroy every branch which existed at common law. This is amply, and luminously treated on, in Tucker's Black. Appendix B, p. 16, sect. 2; sect. 17, 24, 25, 26; and note to p. 17; p. 19, sect. 31, 32; p. 40, sect. 113, 114, 115, 117, 118; sect. 126, 127, 128, to 145, and p. 42

In the early periods of English jurisprudence, a question occurred—When a statute created a new felony, whether the circumstances pre-existing in the common law, were to inhere in the new felony. [Here Mr. Botts drew a distinction between *principal* and *accessorial* guilt, from the English statutes; where one was, and the other was not, allowed the benefit of clergy. He referred to Foster, p. 355, 356, 357; which proved evidently, that there was a distinction.] Also, 1 Hale, P. C. 529. He also referred to cases of piracy, where the common law of Great Bri-

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tain could not be in force, because it was a crime *hostis humani generis*. 3 Inst. 113. But several statutes were made relative to the offence: "St. 4 Geo 1. c. 11, expressly excludes the principals from the benefit of clergy." 4 Bl. 71, 72

We understand this to be clear law; and it has been elucidated by Mr. Wickham, not only from his producing the legal use of the word "principal," but from the reasoning which he deduced from the Act of Congress, vol. 1, p. 100, sect. 2, sect. 6, &c. where all incidental offences, such as misprison of treason, and misprison of felony, are mentioned, and punishments enacted. There being no common law in the United States, no common law principle of a foreign nation can be introduced, more than a foreign statute can: and, surely, Congress did not intend to provide for incidental offences as principal crimes, when those principal crimes were already provided for. Sect. 10 to 18, all provide for incidental felonies, which evidently distinguish them from principal ones.

I understood Mr. M'Rae's admission to be general, that there could not be accessories after the fact in treason: and therefore no person in such a case could be guilty of treason. I understood Mr. Wirt to have expressed himself somewhat different—that at the time Congress legislated on this subject, there were accessaries both *before* and *after* the fact. Apply these arguments, and what would be the fact? Accessaries, both before and after the fact are offences known in the United States; because the common law had given it birth, as incidental offences: but if the common law, powerful as it is, was not obtaining in the United States, one way or the other, how is it that it could be brought to bear, to make the other crimes? This is making the common law to be one half in force, and the other half to be rejected by statute! How can the Court decide, under such circumstances? If the common law was in force at the time Congress legislated, so that accessaries after the fact were incidental to the crime of treason; then, so far as Congress did do away that accessorial crime after the fact, so far it would have been repealed and not in force; but that all cases which were not so rejected would be still in force, except some subsequent law had abrogated them! Thus, as in the case of Lady Lisle, any person who should give a single breakfast to a traitor must be hung, whether he assisted before, or stopped there, or not!

It is a rule, Sir, in the common law itself, that where a statute creates new offences, and declares that the principal, and some particular defined aiders should be guilty of felony; and goes on to a limited description of accessorial agents in particular cases, that no other accessorial agents but those falling under the classes described, can be felonies.—1 Hale, P. C. 235.

Now this is exactly the case at bar: the Constitution and act of Congress have made out two offences as treason against the United States. The first act of Congress on the subject defined what treason should be, in the words of the Constitution. In another section it provides punishment for a particular description of *aiders*, without providing for any other description; and therefore those not provided for are necessarily excluded. Now if accessorial offences are incidental, by virtue of the union be-

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tween the common law and the statute law, then, to be sure, those not mentioned must be governed by the common law principles: for then all the incidental circumstances of the common law doctrine must adhere!

Upon the subject, that the accessary cannot be tried but in the place where he committed the accessorial act, even under the statute (and without the aid of a statute he could not be tried at all any where) Mr. Botts read 4 El. 303. Kelyng, 15. 2 Dall. 354, to prove that the accused must have been present, and must have taken a part with the insurgents.

The case has been made out in the most alarming point of view by the prosecution. Mr. Wickham has, in most respects, amply answered it: If I should repeat or enforce his reasoning, I know he will excuse me. Now, sir, if their doctrine prevails, that accessorial treason *can* obtain, I would ask what benefit could any accused person of accessorial agency obtain from the Constitution and law, which requires the testimony of two witnesses to one overt act? He may be charged with having connection with treason in a place he never saw, and with persons he never knew!

Mr. Botts here went into a description of the whimsical story, (as he called it) given by Mr. M'Rae, where a murder was committed in one room of a house, whilst the accessories were in the other part of the house. He drew the simile to extend to the seventeen United States, which he compared, in compact, to one collossal house; and supposed it very easy for a man to be a principal who should be in one of those rooms, when the act was committed in the other. But it has been even supposed to extend itself farther: even to Great Britain. Now I must ask the gentleman candidly to tell me, how it is possible for a man standing in the room *Georgia*, to be constructively present in the room *Massachusetts!*

But, my worthy friend appears to be somewhat more at ease when he gets out of the house into so large a place as a park, where there were persons of the same party as he who perpetrated the act. But these are cases where the persons are supposed to be immediate actors, and ready at a moment; or on a signal, to give assistance: there the books say that such persons shall be principals: but it is otherwise where the person was not near enough to be in the act itself. He supposes that Col. Burr might have been in Kentucky, to give notice when the Philistines were coming! The case of David and Uriah in Foster, 361, was mentioned. *In foro cœli*, this is true: I have no doubt, (with the gentlemen) that David was the murderer. But is it also true in *foro ciculi?* By no means. But he asks whether the *sender* would not be as guilty as the person whom he sent to do the act of murder? Certainly he would.

Mr. *Wirt* said, he had used that case in exclusion of the common law altogether; and had considered it upon the principles of reason and common right. The next case used was of two men coming there to search for an horse-stealer, and one of them should kill him, when it was the predetermination of both to do the act. The gentleman asks whether one of these, who did not the act, would not be as guilty as the one who did it? In *foro*

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sæculi he would not be guilty at all; but in *foro cæli* he certainly would be.

Mr. *Botts*. A number of persons may *conspire* to levy war, but are they guilty of levying war? In England, a conspiracy to levy war would be an offence; but in this country it is not an offence. Here, in order to affect the treason, there must be an actual assemblage, and war actually levied. Contrary to this, the gentleman contended, that those who conspire to levy war, are guilty of treason.

Chief Justice. Lord Cook says that they are guilty of treason under the law of Edward 3d, but it is as accessaries to those who do levy war.

Mr. *Martin*. We can shew that all those cases refer to conspiring the king's death.

Mr. *Botts*. I believe that there is no case reported in the State Trials, where the evidence went to charge the person indicted with levying war, without shewing the *actual* presence of the person charged. This is the inevitable current of all the prosecutions that touches the subject: and no other persons than those who *acted* in the war could be prosecuted. I cannot refrain here paying my acknowledgment to Judge Tucker, to whose elaborate and useful researches we are much indebted: though we may have gone to England for law and precedents, yet his clue alone to their application here, merits our warmest regards. From the date of Judge Tucker's researches, I date the new and improved light, with which we are favoured in respect to accessorial treason.

There were several cases read to you, respecting the nature, degree, proximity and transactions to constitute persons legally present at treason; and when those cases were read, the gentleman said that he would leave those cases to the consideration and decision of the court. This, Sir, was an hard task to perform; and the gentleman must have been sensible of the difficulty of it in so strong a light, that he would rather not attempt the application of it himself. Mr. Botts concluded by apologizing to the court for the patience with which they had endured so long an address as he had offered to their judgment, not doubting but they would do justice in their decision.

Mr. Hay,

May it please your honour.

However unpleasant I may feel in taking up more of the time of the Court, where so much has been said, I feel it my duty to oppose some of the doctrines which have been advanced by our antagonists. I know that I cannot instruct you by my reasoning; I know that I cannot amuse you by my fanciful pictures; and I know that I cannot make you laugh by my drollery: All that I can do, is to express my impressions on the subject in plain terms, and such as I hope will bring conviction to your minds of the force of my argument—all which I shall do with as much brevity as possible.

Before I enter into the investigation of this very abstruse and important subject, perhaps it may be as well to offer a remark or two as to what those gentlemen have said who followed me in my first remark on this subject.—The counsel have clamorously

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called for us to produce evidence of an open act of war. "Give me," said one of them, "evidence of an open act of war." Another asks whether there was, at Blannerhasset's island, any roaring of cannon, any rattling of small arms, or clashing of swords! Sir, the gentlemen mistake this subject altogether; they are taking ground which, by the Constitution of their country, they are not authorized to stand upon; and using language which the Constitution never put into their mouths. The Constitution says not one single word about an open act of war I repeat, Sir, that this word is not to be found there. And yet, with as much frequency, with as much earnestness, and with as much zeal as though the book was laying open before him and every person could read it, the gentleman contended for his principle. "Treason against the United States shall consist only in levying war against them, &c." This is the overt act of which we speak, and what the gentleman has repeated over and over again must be "an *open* act of war." But he has further said it must be an open *deed*: Of what?—Of war—of battle, and blandishing of arms? This is not the language of the Constitution; according to that, a person must be convicted of an overt act of *levying* war. These words will bear a very different meaning from those expressed by gentlemen on the other side. If so, they are mistaken in the very commencement of their argument. These words are certainly most important words in our Constitution, and merit our attention. Will the gentlemen say there is no difference in the *overt act* of *levying* war, and the *war* itself? If the framers of the Constitution had thought proper to make Treason consist in the *open* act of war, why did they not say so? If they had meant so, then might you justly have said that Treason should consist only in *making* war against the United States! There is so essential a difference between the two things, that it is impossible they could have used words in so unusual a light. When forces are prepared for battle, then there is an "overt act of levying war" committed: but, when the battle is fought, or when the parties rush on to battle, then there is truly an *open act of war*. This explanation is not merely founded in plain common sense, but it is a necessarily obvious construction of the Constitution, and is as distinguishable as is possible from their construction.

The arguments which have been advanced by Mr. Botts, bears so strong a resemblance, not in form, but in particulars of substance, to those which were urged by the gentleman before, that I shall not undertake any *direct* reply to the positions which he advanced; but there was one single remark which related to our conduct: (not that I think he meant any thing personal,) he charged me with calling the attention of the Court something in relation to the Trial of John Fries, and the impeachment of Judge Chase thereupon. He was pleased to observe that we were now advocating opinions which we once reprobated; or, if *we* did not, our political friends did. Here I beg leave to observe, that the censure upon Judge Chase did not flow from any *opinion* which he had advanced upon that trial, as to the law of *Treason*, but on account of his arbitrary conduct; and for his

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doing the thing, identically, which this Court is now called upon by them to do!

Mr. *Hay* here read the article of Judge Chase's impeachment relating to Fries's trial.

Now, Sir, what is the thing that the gentlemen concerned for Mr. Burr, are calling upon the Court to do? Why, to deliver an opinion upon a question of fact, before that question has been argued before the Jury! They call upon you to decide whether there has been an overt act of war committed, or not! and they contend that you are authorized to decide upon that question.

Suppose it should be the opinion of the Court that an overt act of war has been committed, and the Trial should go on; and all that evidence which it is their object to exclude, tending to confirm the facts which have been laid before the Jury: I ask whether this Court, knowing that it is not their promise to answer questions of fact, would be willing to give such an opinion to the Jury? The gentlemen will excuse me when I say that they manifest some degree of inconsistency on this subject: they call upon this Court to do what no Court ever did, from the creation to the present time, undertake to decide—to decide upon facts, and which alone can be referred to the consideration of a jury.

I will now proceed to state to the Court, the impressions which I have of the positions laid down. I cannot however pretend to follow the arguments in their train: they were too subtle and evanescent for my comprehension. But though I could not pretend to follow the arguments, I clearly saw their tendency; and I now mean to expose them to the view of the Court, with as much clearness as my perceptions are able.

The great and leading proposition was this—That Col. Burr, not having been present at the time of the overt act being committed, as stated in the indictment, there is an end to the prosecution; no farther evidence can be admitted; and all the evidence which has been spoken of, must be cut off.

In reply to this proposition, I make the following preliminary objection, that the motion is irregular and unprecedented. They cannot find one single case in the annals of judicial proceedings in Great Britain, where a motion has been made to give any jurisdiction to the Court upon a question of *fact*; and to exclude evidence, directly relevent to the issue. Now, Sir, the evidence which we mean to introduce, is directly relevent to the issue: we mean to charge him with *levying war*, with the *overt act* of levying war: and we contend that the evidence which we have exhibited, will shew the truth of the allegation contained. The evidence is ready; and yet the gentlemen would fain satisfy the Court, that they are authorized to exclude this evidence, by taking to themselves a power which never was taken by any judge—to decide a question of fact. It may be supposed that I speak with more confidence than I ought to on the present occasion; but I do not. I will tell the Court why I have that confidence. It is not that I rely on the extent of my own information or understanding merely; *but*, I am certain that if such a case did exist in the annals of Judicial History, it would be furnished by some or other of the learned counsel of the prisoner.

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I know their labors and their understanding to be competent to the discovery of such a case, if it existed. But, if it cannot be done, it is removed beyond the possibility of a doubt that this case cannot be warranted in law.

I shall have occasion to shew, that cases have occurred where such a motion might have been made with as much propriety as the present is: but neither the learned counsel in Great Britain or America thought of such an expedient. They really do surprize me; but this is not the first time; for at the very commencement of this case, we had to encounter difficulties which were never known in this, or any other country: I refer to the challenges made to grand jurors. It never was a matter of much solicitude with me; and I never thought it worth while to trouble myself about that: but this following after, I cannot avoid mentioning the dangerous tendency of this unprecedented effort to stop the evidence from being heard. It is dangerous as a precedent, because, if ever this Court should ever determine that they have the power to take upon themselves the question of fact, the trial by Jury is *gone!* you break down one of the greatest bulwarks of civil liberty! Mr. Wickham observed that as a citizen, and as a father, he felt an extreme solicitude; but he will excuse me if I say that his solicitude was directed to the wrong point. It is of infinitely more importance that an erroneous construction should be put upon the law by giving the power of decision on a part of the evidence to the Court, concerning treason, than that the whole case should be intrusted, as it is to a Jury. It may, here and there produce perjury: a victim, as they please to call it, may be here and there offered up, perhaps. I know that the gentleman does feel (as we all ought to feel) for the preservation of our liberties; and for those principles which ought daily to be felt in every part of the community: we know that we are all daily witnesses of encroachment on those systems which are intended to serve our community. I am sure that if the gentleman had manifested a support to the doctrines for which I now contend, and had exhibited the same learning, ingenuity and talets which he has displayed on the other side, *he* could have satisfied this Court, and every man, that the principles which have been advocated lately within these walls, are fraught with more terrible mischief than can be easily conceived. In this light the subject has always been viewed by me; and I call upon the gentleman to produce a contrary testimony, or a contrary case. No case, Sir, ever existed till the present moment: and according to the doctrines of law, the inference must be, that no such law is existing; and no such motion ought ever to be made.

I will observe to the Court, before I enter into Mr. Wickham's train of reasoning, that this great and leading proposition of his, is founded on the insufficiency of the evidence to prove the overt act. Here he has assumed a fact which he had no right to assume: he has no right to say that the evidence which we are about to advance will not prove the fact. He might say that so or so was said at the bar, and produce his contrary authorities; and on the contrary, I have no objection to declare that the prisoner

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was guilty of the fact alleged by a strong constructive presence. Nay, I shall not object to declare, that the evidence which I am about to bring, will prove the actual presence of the accused at the time charged. How, then, can the gentleman object to evidence which is about to be introduced, upon the assumption that the facts which are about to be produced will be insufficient to obtain a verdict of guilty upon the indictment?

Chief Justice. The argument has gone on, and the Court have so understood it, upon the idea that the fact was admitted in Court, that the accused was absent, and in the state of Kentucky at the time charged.

Mr. *Wickham.* He did state plainly to the Court, that he had no evidence to prove that Col. Burr was present. However, if he means to retract, let him now come forward and prove that he was present.

Mr. *Burr* The gentleman had reason to know that I was not present, but that I was on my way to Tennessee.

Mr. *Hay.* I do not know that I shall be precluded of the right to produce my evidence of facts from any admission which I might make: though the gentleman may have a right to take it for granted that he was not there, from the statement I have made.

Mr. *Burr.* I disclaim it altogether: he is not able to prove my presence; and therefore I wish him to use his utmost to produce evidence upon that point.

Mr. *Hay.* I do not expect to prove that he was upon the island at the time: indeed the evidence leads to the conclusion that he was not there: they have no right however to take it for granted that we cannot prove any such fact. Lest the gentlemen should suppose it inconsistent with candour, I will drop any farther discussion on this subject, with the remarks which have been made.

But, suppose it to be formally, officially, and regularly admitted, that the accused was not on the island: then, Sir, comes on the great question, "What will be the result?" The counsel say that "there will be an end to the prosecution; for all other evidence must inevitably be irrevelent, and therefore must be arrested: you have failed in an *essential* point, and it will be impossible for you to proceed one inch!" Now, as the gentleman knows full well that such a position would not be readily acceded to, he thought proper to use the utmost effort of his talents upon it: and it was supported with as much learning and ingenuity as perhaps was ever displayed within these walls.

This argument was used under four distinct heads: First, as Mr. Burr was not present, he was merely an accessory, and not a principal; and that being the case, an accessory in treason is not an offence punishable under our constitution and laws. Secondly: That if he be a principal in the treason, he must be a principal in the second degree; whose guilt therefore, in consequence of his being absent, is, in itself, derivative; and, therefore, no parole testimony can be given. Thirdly: Because the facts must be proved as laid; and as the indictment charges the prisoner with levying war on Blannerhassett's island, and the evidence does not prove him to have been there, all the other evidence is inapplicable, and therefore ought not to be heard. Fourthly: Because

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no parole evidence can be given to connect the prisoner with the transactions on the island, until we shew an act of treason to have been committed there, and the assemblage there to have met for a treasonable purpose.

The doctrine to be maintained, on the part of the United States, in opposition, has already been stated with such perspicuity, and illustrated with such ability, that it would really seem unnecessary for me to say a word on the subject. I shall not, therefore, say much, except it be in relation to the coincidence of the opinion of the Judge who presided at the examination; and the opinion of the Supreme Court, whose authority has been so strongly denied.

Besides these four leading points, there were two others of minor importance; which I merely mention, in order to let the Court see that they do not go unnoticed. I shall not trouble the Court on them—because one of them is abandoned by the gentlemen themselves: and because the other was not much pressed by them. However, in the earnestness of his zeal, commendable zeal, no doubt, he did make these two positions in support of his argument. The fifth position was, that Mr. Burr was charged, in the indictment, to be concerned with persons unknown, when the evidence proved that they were known: and sixth, that the indictment stated, that there was a war, when the evidence shews that there was no public war.

These reasons, Sir, constituted the main pillars of the mighty edifice which the gentlemen had raised, upon which to build the defence of their client. Now, if that was the only object they had in view, or if they could attain their object without doing injury to the community, I should not feel a solicitude, such as I now do, to oppose their structure: but whilst they are erecting this mighty edifice for him, they are erecting a more mighty fortress, by which they will destroy the temple itself: and they cannot complete their edifice, without obtaining means to ruin the temple. I shall examine this; I shall endeavour to shew you that they have no foundation; and that the materials of which their temple is made, are rotten, and will not stand.

In doing so, I am sensible that it is a disagreeable task; and, I can assure the gentlemen, that I do not mean to press one principle which I do not most sincerely believe to be correct, however they may suppose otherwise. I consider it to be the duty of a prosecutor in behalf of the United States, to expound the laws with *honor* and *candor*; and I can assure the Court, that I shall do it with integrity and impartiality too, whatever views may be taken of my official capacity: Nay, I will say, that I will do it with independence. It is possible, and, perhaps probable, that I may not be suspected of that state of purity which it may be my desire to maintain. It is possible, nay, probable, that the feelings which have been excited in this case, and which the gentlemen themselves have produced, may have excited feelings in my mind extremely well calculated to mislead me. I can inform the Court, however, that I have endeavoured, and shall still endeavour to avoid all those painful sensations which would have any tendency to bias my mind towards desiring that any innocent person should be convicted.

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Before I follow Mr. Wickham through his devious, perplexing, and eccentric course of argument, I will examine the general result: Where does he mean to carry us? Is it in the straight road of common sense? Is that supposition deducible from his arguments? No, Sir; the consequence inevitably is, that the evidence which would bear most strongly upon the issue, is to be cut off: all relevent evidence is to be all at once arrested and suppressed, in the middle of the proceeding; and we are to hear no more it, because it is said that we have not proved the "overt act;" and therefore, the prosecution must fall to the ground.

Now admit, for a moment, that he was not present, but that he had a powerful government of those transactions; it certainly would prostrate every principle of justice, to hold him in any other light than that of a principal. It would be a violation of justice in this or any other country; and especially would it be contrary to the system of jurisprudence held sacred in that country from whence we draw our code. We say, that *actual presence* is not necessary, according to the statute laws of this country, nor according to the common law of England, provided the accused is leagued in the general conspiracy, and performs a part in that conspiracy—"however remote," or "however minute." This is a position which we are authorized by the supreme court to take, sec. 6. The law is clear and perspicuous, authorizing the very position which we have taken, and in the very terms which we have introduced it to the Court. I hope, therefore, that it will not be repeated, that the gentlemen who advocate this position, dishonor themselves; because, they surely have good authority to support them.

If such then be case, as we earnestly contend it is, ought we not to have it in our power to submit all the evidence which is connected with the transaction, to the jury? It is a great question of law and fact under the constitution, whether he has been guilty of the overt act of levying war against the United States, or not: and this is a question for the consideration of the jury, and not of the Court. We say, Sir, and confidently believe, that whether the accused was present at the moment, or whether he was at any other place, is totally immaterial: it cannot have any effect upon the weight of the evidence respecting him; and the case cannot be taken out of the hands of the jury without a most flagrant violation of the best of principles, and the destruction of every security connected with civil liberty. Sir, you have already decided this question, long before this elaborate argument commenced, and before you could have anticipated such an extraordinary motion. You have said, Sir, that this was a question of *fact* and not of *law*; and, therefore, it must be decided by the jury. "The opinion of the Court on any point of law may be asked and given to the jury; and even after that, the jury, upon a whole view of the case, may give their verdict in direct opposition to the opinion of the Court. The court leave the facts to the jury; but if they please, they may decide upon *law* and *fact*." Littleton, 368; Co. Lit. 355. Upon these, and all other authorities, it is clear, that the evidence ought not to be cut in two: Every thing that bears upon the point in controversy, must be admitted,

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and no Judge ever dared to withhold such evidence from the jury. I call upon the gentleman (again) to produce an authority, if such there be.

I feel not the danger which such a doctrine as that for which we contend can produce, whatever they may think. I feel infinitely more about their principle, than I do about a misconstruction of the Constitution in the way they apprehend; because, I do not think there is danger of a traitor being wrongly convicted; or, that our construction can affect the vital liberties or civil rights of traitors. The doctrine of jury trial *ought* to be viewed with the utmost reverence. When a Judge is about taking a step which may lead him beyond the line of his authority, he ought to advance towards that line with the utmost caution. A good Judge would rather stop a mile on the safe side of that line, than go one hair's breadth beyond it; lest he sap the foundation of our inestimable Constitution and civil liberty, and establish a dangerous or oppressive precedent. And it is owing to this care which has always been taken by the bench, that the gentleman, with all the learning he possesses, and all the laborious research which he has used, has not been able to produce one solitary case where such a decision has been made; nor even one solitary case, where counsel have had the temerity to bring such a question before a Court. They have not even pretended that they could support their motion by reference to direct authority, in black and white. But they think that they have accomplished their point, by producing one or two cases, which they suppose would warrant such an inference. Let us examine these cases which are supposed to justify this motion to exclude farther evidence.

They say, that where a man is indicted as an accessary, you must produce the record of conviction of the principal person concerned. They produce this argument with a view of calling upon us to prove first, the conviction of the persons who were upon Blannerhassett's island; and then, say they, you may go on with the evidence This argument, Sir, is not law; and if it were, it would not bear the inference which they would draw from it. If it is not law, all the investigation we can give it, will not make it so. The gentlemen seem to have taken it for granted, that this bold assertion of their's would pass, if not unnoticed, at least uncontradicted: and, therefore, inferred that they might have the liberty to exclude enquiry whenever they pleased. Now, the real doctrine is this: If a man be indicted as an accessary, he is at liberty to state, *before his trial,* that he does not choose to be tried until the principal shall have been convicted. The Judge, knowing all this to be his right, suspends the prosecution until the principal is convicted. It is a principle which the law of England allows, to require the conviction of the principal first: but it never was heard of, in England or here, that the accessary was at liberty, *after the jury were sworn,* and a part of the evidence produced—when he finds that it begins to bear heavy upon him, to move to stop the remainder from being brought forward. This is supported in 1 Hale, P. C. 623. The gentleman took a part of this authority: I will choose to take the whole of it; from which it will appear, that the basis of the

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position laid down is not law. But, if he be considered as an accessary, how is it possible to put an end to the trial, and discharge the jury, without their examing all the premises of the case? There is no inference that can be drawn, which will support the motion upon legal principles. These remote precedents which they produce, are not analogous to this case; and many of them are assumed as law, when they are not. In whatever capacity it may be supposed that the party is indicted, the decision must be made upon the facts; and, therefore, whether the Court or the Jury decide upon the question of fact, their inference must be erroneous, when they think the evidence ought not to be heard. Here is a particular fact charged on Blannerhassett's island: we offer evidence to support the charge of that fact: the accused says he was only an accessary, not being present there; and, therefore, under the law and constitution of this country, he is not punishable. Now, does not this amount precisely to the question before a jury? Is not the defence which he now makes, identically the same as though it was made before the jury? What is the plea made before the jury? "*Not guilty.*" He supports this, by saying, that he was an accessary; and the Court are called upon to decide the identical issue which has been already referred to the jury; and what is worse, they are to decide that issue without hearing more than one-fifth of the evidence! Of all the novelties which have ever been presented to the contemplation of a Court, this is the most strange; and of all doctrines that ever have been contended for, this is the most unprecedented. I call upon the united learning and labor of all the gentlemen, to discover, from all the volumes within their research, a precedent. They draw inferences to be sure, but I think it has been plainly shewn that they draw erroneous ones.

But, Sir, to press this point a little farther. I must confess that I feel greatly interested in it: infinitely more than I do about any other part of the case. I repeat my argument: if the Court undertake to decide, do they not decide that he, not being present, can, at most, be but an accessary; or even that he is not an accessary; and, therefore, he is not guilty. This is a question the jury, *only*, are sworn to decide. We have an indisputable and sacred right, to lay before the jury all the evidence which is relevent. This is what I wish to do, and this is what the prisoner is anxious to prevent. The Court have recognized this doctrine, in speaking upon another point the other day. The Court did say, that they would give no decision as to the point of levying war. Will they, then, undertake to decide the whole case, and say, that, in consequence of the absence of the accused, he is not guilty! Will they say, that evidence relating to the case, in consequence of his absence, shall not be heard! Sir, it is a question of *law* and *fact*, whether the accused did levy war or not. We charge him with levying war, and he denies it. The rule which has uniformly governed all proceedings from time immemorial to the present is, that all evidence bearing upon the point shall be received. The other day, Mr. Martin furnished a case from 4 St. Tr. 661, to support the doctrine which he supposed would give the Court a power to decide upon questions of fact. There might, perhaps, be something in that long case of 40 or 50 folio

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pages, that might favor some of his doctrines; but there is certainly one point argued and decided there, very similar to this, and which must destroy the position. The counsel thought the overt act was not proved by two witnesses; but, Sir, *no motion* was made to stop the enquiry; on the contrary, Lord Holt, in giving his opinion, says, that whether the facts were or were not proved, was not for *him* to decide—*that* was the province of the *jury*. 2 Dallas, 356, is a similar case. There was one witness who swore to the overt act: another said, "it run in his head" that it was so and so, and that he had seen the accused at the place of rendezvous. Though it was contended, in that case, that the fact was not made to appear by two witnesses, yet no motion was ever made to exclude the testimony which remained. Now, how came it about that the learned and able counsel in those cases, did not take the course which has been recently discovered by the accused here? Had the counsel for Rookwood, A. D. 1696, or the counsel for Mitchel, A. D. 1794, less talents than those who now appear here? They were gentlemen of great talents, learning, and character; and had as much zeal for their clients as they ought to have possessed; but, I must confess, not equal zeal to that manifested here. But it never entered into their minds, that, because the prosecution had not proved a particular point of enquiry, that the whole case was to stop before the evidence was all given.

I will trouble the Court with one other remark. The gentleman said that it was laid down in the books, that after proving the overt act in the county where it is laid, you may then go on to prove other overt acts in other counties. To support this, he referred you to Hawkins, 125, 126. From this, it is inferred, that the *Court* must decide upon the question, whether the overt act laid, is proved or not, before the admission of any collateral evidence; and that, if the overt act be not first proved, the other evidence must be rejected. Now, Sir, I conceive that the real rule is this: After introducing and examining the evidence as to the overt act laid, you may then give evidence of overt acts in other places. But by this, the Court do not decide upon any fact whatever. According to my exposition, it is the rule of the Court, only to say to the prosecutors, "gentlemen, introduce your evidence relative to levying war on Blannerhasset's island *first*." If there is no evidence of any facts there, and the witnesses should be relating other things, then the Court have power to restrain, and require relevent testimony only to be given. "The party is charged so and so: introduce first your evidence upon the point of the indictment, and then you may introduce evidence from other counties, which may be collateral, and therefore relevent." If the *decision* may be made upon the proof of the facts first, I must declare it contrary to all maxims and trials in law, and in direct opposition to your own solemn decision at another time. I admit, that it may be stopped until the principal facts are introduced; because, 'till that is brought, the other can have no bearing on the case. This affair of difficulty will not present so formidable a face, if we consider that some trifling mistake may have crept into some one of the authorities. Even intelligent writers, and able speakers are not always able

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to extricate themselves from the errors which a want of precaution might let slip. Sometimes a word might be twice repeated in a very small compass, and other errors occur unobserved.—Now, let us apply this to East, and substitute the word "evidence" in place of the word "proof," and then it resolves the authority to exactly what I say.—1 East. 125. He might well do it, in order to avoid what might be termed an unpleasant repetition. This will make their mighty argument vanish to nothing; because their mighty Colossus would have nothing to rest upon. By this trifling expedient, every difficulty will be removed.

But, there is another difficulty, if this rule is to be taken literally, which will demonstrate the absurdity of it. After "proof" of the overt act, of which the Court are to judge, the gentlemen say, "you may produce collateral evidence." Now, they say we cannot do it, because we have not proved the overt act; and whenever it is admissible, the Court lets it in on the ground of the *overt act* being first proved. What is the result of this?—Why, that after the overt act is completely proved, the Court say that you shall have the *privilege* of bringing in other evidence to prove it! Now, would there be any thing like sense in this? If there is, I am not competent to discern it, I must confess. These ideas were advanced by Judge Peters in Fries's trial, 175; and certainly it is a difficulty which no human ingenuity can surmount; because it goes to tranfer a power which has never been exercised by a court of law from the creation to the present day; and such a doctrine must merit our highest indignation.

The argument now about to be introduced, was advanced by Mr. Botts, in the course of his ingenious, droll, and learned address, from 1 East, 96, 97. The general principle contained here, is—that if you are trying A for a particular act, you cannot bring against him the acts or confessions of B, unless the connection between A and B is proved—and then it might be relevent. This you must do, before you can bring evidence respecting B's guilt; but the moment that the connection is proved, you may go through with your evidence. This is all very true; but the important question is, who is to judge respecting this connection? East says the Court must judge! Now, I will ask, who made East a judge in this case? There is no reference to any authority whatever. What does he get his law from? Not from any express authority. I presume he got it from inferences and deductions made with the same sort of ingenuity as Mr. Botts drew his conclusions. It is a great undertaking for a man to write a great book; and it is not to be wondered, if expressions should escape without much notice. Sometimes Hale, Foster, Blackstone, and others, have been guilty of it; and such is the infirmity of the human mind, even in great men. Surely, the gentleman will not require that we should take the *dictum* of East, when that *dictum* is unprecedented; and, especially, when we turn over two more pages of his book, and there discover to what danger doctrines may lead us if we quit the plain principles of *common sense*. That is a *terra firma* where we can rest without danger. But, when we get on the great ocean of ad-

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judication, there is no knowing how soon we may sink and perish. He then goes on to say that it was the duty of the Jury to judge of the connection! What then becomes of his *dictum?*—Certainly his genius nodded and slept on that occasion, or he would not so soon after have introduced such contrary doctrine.

And what becomes of the argument that is built upon such doctrines? It cannot stand. And yet, on such cases as these, they rely to illustrate and support their monstrous proposition!

I may possibly do the gentlemen injustice; but it is not my wish; I will endeavor to avoid it. I think I have examined all the positions which they have taken, by way of inference and deduction, to justify their application to the Court, and I declare that I cannot conceive one that bears the smallest resemblance.

[The hour of adjournment being arrived, the Court here adjourned.]

Thursday, August 27.

Mr. *Hay* continued—But, Sir, I must not forget the reference made by Mr. Botts to M'Nally 547, rule 3. I must be under the necessity of saying that his argument is not warranted by his authority; and what is remarkable, is, that the authority itself is unsupported by any other. But there is no comparison in the cases: this case was on a special verdict: the Jury agreed upon the facts and left them to the Court, to decide upon the law. This very page proves it clearly that the Court are to give an opinion on the question of law, respecting the "malice, and not the Jury; and the Court are also judges of the fact *found by the Jury*, whether, if the quarrel was sudden, there was time for the passions to cool, or whether the act was deliberate or not." 9 St. Tr. Lord Raymond 1496. 2 Strange, 773. The Judge here says "the Jury, under direction of the Court, *in point of law*, matters of fact being still left to their determination, may, and if they are well advised, will find a *general* verdict, conformably to such direction."

Such are the difficulties and dilemmas in which we are involved: reference is made by the counsel to authorities which are not supported; and then, by reference to the original cases, we find that they are not applicable to the case in hand!

It is for such reasons as these that we wish always to step with care upon authorities: we may introduce authorities in the same way, but we forbear: when I address a Court and Jury upon the principles of *common sense*, then I am upon sure ground; nothing is more sure and certain; and it is worth all the learning that was ever conveyed to mankind. This may be considered by Mr Martin, as it has been, as equivocal and uncertain; but he cannot maintain his position.

What is very remarkable, Sir, in Mr. Botts's argument on quotations, he himself has conceded the very point which he had before controverted; for he acknowledged that a Jury had an indisputable right to decide both law and fact! Is it necessary to press this truth any farther, or to enter into an argument to prove that this Court ought not to exercise a power which was never exercised by any other Court; and which never was ascribed to the attributes of a Court? It is a waste of

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time, even if 40000 authorities, instead of the two or three which have been mentioned, were produced, if they were no better; and they ought not to be regarded, because they must lead to consequences fatal to the very existence of a Jury, and the rights of citizens.

I might show that the pillars which have been erected have no foundation. Now, Sir, examine the materials of which they are composed, and you will find that they are *rotten*. This is the fairest mode of argument that can be adopted: look at the results to which they will inevitably lead. However eloquently and ingenuously a doctrine is supported, yet, if its tendency, or consequences, will be bad or oppressive, the principle must be rejected, however plausible it may appear.

Mr. Wickham observed in his propositions, that Mr. Burr was at most an accessary; and, that being only an accessary, he is not punishable by the Constitution and laws of the United States. His first remark was, that there was no treason in the United States, but what was defined in the Constitution: agreed: that is sound law. "No man," he says, "can be punished but he who does the act." This is reason and law. But, sir, he says that this act of levying war against the United States, cannot be performed, but by a person present on the spot where the offence was alleged to have been committed, and without the war was actually made. I deny the correctness of these positions: I say that it is not founded in sound sense, nor supported by a correct interpretation of the Constitution. Nor is it warranted by the laws of Great Britain. I say that a man may levy war without being present on the spot where the offence was committed; or even without any *actual* war at all having been made. I have already stated the difference between *making* war, and *levying* war: this will have some weight with respect to the actual presence of the person. In levying war, the *actual* presence is by no means necessary—the man who *levies* war, is the man who projects war: the man who enlists, or causes to be enlisted, troops, &c. Such an one is very cautious in his movements to prevent a discovery; he therefore does every thing as much as possible *in secret*. The man who is at the head of such an illicit business will always avoid much public notice. What would he do? He would have his agents here, there and every where, that might answer his purpose; giving them direction how they should act; and when and where he would meet them. How can it be necessary that he should be present? there may be twenty different assemblages, perhaps, and he may have a thousand men in league with him—he may have a large party under one chieftain at one place and others at other places; but he cannot be every where himself; and yet the design may be to bring them all into co-operation: but they are all under his principal direction. He is waiting until all his troops shall rendezvous at one place, and until he is able to strike the effectual blow. It cannot therefore be necessary, upon the principles of sound common sense, that he should be present every where, or any where, since he guides the *whole* by his express order. The Court will observe that this argument relates exclusively to Mr. Wickham's first position. The common sense and common

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understanding of mankind has decided this question. Referring, Sir, to our own history: did not George 3d. levy war against this country? whether he was hunting in his park, or exhibiting himself in his robes to his parliament: and although 300 miles off, it was *he* who levied the war. He raised the troops (though not in person either;) he gave the orders for action. Can it be said that the soldiers or the generals, who came here for plunder or capture, levied the war? By no means: they made war, but they did not levy war. A man by being charged as a murderer or a robber, must do it in act, or by intimated connection: but the levying war is very distinct; it is the sovereign or chief, who is the spirit and mover of it, that *levies war*.

But, I think, upon principles of common sense and common understanding, a man may not only levy war without being actually present, but he may *make* war in such a situation. I believe that history makes mention of many who were not within the field of battle—who perhaps were not within gun-shot, or within sight, or perhaps far in the rear at the time of a victory being obtained, but ever ready to give assistance in case of necessity: and yet the battle was made by that general, and *he* had the glory of the victory. Such is the case at present; admitting that Mr. Burr was not there; yet the men who went there, went by his procurement, and were subject to his direction; and they went there in order to prosecute the object which he had in view. They acted in exact conformity with his pleasure and order; and he afterwards joined them, when they assembled at the mouth of Cumberland, where he took the command of the whole of them. If, then, the assemblage on Blannerhasset's island be, in the estimation of the law, an overt act of levying war; the person who procured that meeting—by whom, and by whom alone that assemblage took place—must in fact, be guilty of procuring the assemblage! and consequently, of levying war against the United States.

To pursue this argument a little farther, I will suppose, even, that he never was on the island; but he knows where his troops are. He apprehends an attack may be made on them, and he is determined to oppose the attack, and assist his troops. He sends more men; he supplies them with a sufficiency of arms, ammunition, &c. and his directions are communicated what they are to do. The attack is made and repelled, whereby thousands fall: yet, according to the doctrine held forth, because he is somewhere else, transacting the business of the war, under what they conceive a fair construction of the Constitution, he is not a principal but an accessary only, not being upon the spot, and therefore *this Court* (not the Jury) are to declare him not guilty.

Now, Sir, is it possible that the human mind can be so perplexed and so misled by the ingenuity of argument? Can it be so bereft of all the power of reflection, as to pronounce that the great projector and promoter of all their actions, should escape legal notice, because he was not present? Can the prime mover of the scheme be *constitutionally* saved, whilst his deluded followers are to be hung! and yet this was the doctrine supported

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by Mr. Wickham: he made as little ceremony of hanging Blannerhasset, as Burr did of hanging Miranda. This Sir, is a principle as repugnant to common sense, as it is to every principle of nature and of law. Certainly I deplore the crime, and pity the misfortunes of Blannerhasset: he has done wrong: he has grossly and traitorously offended against the laws of the country. But I cannot depart from that feeling which I possess: for I am compelled to say that there is no more comparison between the guilt of Burr and Blannerhasset, than there is between the breeze which gently shakes the tender leaf, and the tremendous storm which makes nature tremble, and the earth desolate. If this be not the true construction of our Constitution (which is our polar star, by which we must be governed, and from which we cannot deviate;) I call upon the gentleman to tell me what is? If we look at home, we shall find this doctrine has already been adopted by the Supreme Court of our own country.

But the gentleman will not accept of this decision. It is declared not to be law. This has been represented in stranger terms than I believe has ever been used at the bar before: this however, was not intended for the Court, but for the counsel.

The gentlemen have declared that I have said this was an extra-judicial decision. I did say that any opinion given, not on the point in dispute, was extra-judicial. But Mr. Wickham assumed the point upon different grounds; which it may not be proper to examine, but go into the nature of that decision itself. Mr. Bolman and Mr. Swartwout were committed, and called for their enlargement from prison by the *habeus corpus* of the Supreme Court. I do not know how they were defended, but when I cast my eyes to that part of the country, I cannot doubt but they were defended with considerable avidity, talents and zeal. It did not appear that *they* had ever been at Blannerhasset's island, or had ever been with any of the party collected by Burr; and therefore, it must be presumed that they were not present. I must therefore, be at liberty to *suppose*, (for a short time: the gentleman (Mr. Botts) did suppose for two hours—) that the counsel defended them upon this ground: If they did, surely the Court would have occasion to decide. This is the identical position which we have defended. But let us give up to them that it is extra-judicial; certainly I am at liberty to say that this opinion of the Supreme Court was passed by Judges who had studied the law; and who are entitled to the highest degree of consideration and respect for their legal knowledge: and that their decision ought not to be departed from, without reasons, very different in their appearance and effects from those we have heard. The law, as it is expounded by the judges of this country, is not suitable for those gentlemen's purposes: they must go to the common law of Great Britain to prove that he is not liable. But let us see what benefit would arise to them from this importation of common law. So soon as they open the volume of common law, they find this doctrine—In treason, all are principles! This doctrine meet them at the first step. But, says gentlemen, we will not rely upon this. And then a gentleman turns towards us with exulting confidence, seeming to have re-

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ference to some opinion which has been given: "the common law of England is not in force in the United States." I do not mean, Sir, to controvert that opinion: I mean to say, as I always have said, that it is not in force here; and believing so, I would not say otherwise, (however the gentlemen may think) even if saying so would promote or procure the conviction of the accused; and even if by it I could become the most popular man in America. I would rather do right with the approbation of my conscience, than to hazard the doing of wrong with the learned world, or to obtain popular favor.

But how does the gentleman avail himself of our concession? The moment that we say the common law is not in force, he takes it up for his own use, and tells us that we cannot then resort to the common law doctrine, that all are principals in treason; and therefore we must shut the door against any such argument. This distinction, Sir, is not to be found any where but in common law. Now, must there not be some desperate case in hand, when a man of the reasoning and argument of Mr. Wickham, would, at one moment say that the common law was not in force; and, with the same breath, refer to it for his support? But desperate disorders, require desperate remedies; and, however it may excite in his mind the *utmost* horror, he avails himself of the common law, to borrow from it distinctions which he endeavours, without any kind of reason or propriety, to fix upon the Constitution: and when he has done that, he has done the very thing which he has charged us with desiring to do: he has rendered the Constitution a mere dead letter! This is the distinction which he borrows from the common law: the principle, he says, is, whether the person was *present* at the spot: an *aiding* and *abetting actor*—Is he the perpetrator of the act? the accessary is one who is absent, and who counsels the other that commands the affair. This, he says, is the difference in England between the principal and the accessary. He then takes this definition, and applies it to the present case; deducing therefrom, that he who we called a principal, is no more than an accessary: and, as an accessary was not punishable under the Constitution of the United States. So Mr. Burr was not punishable at all. Now, Sir, I do think, that, after what the gentleman had said about the common law, he had no more right to introduce this distinction from common law, than he had to have referred to the code of Gentoo laws, or any other absurd code in the world. I think he had furnishes us with ample reason why no resort should be had to the common law, for the exposition of our Constitution. Indeed I must be permitted to say, that there would be something extremely humiliating in such an appropriation. Here are a number of men of the first rate capacity and talents, who have undertaken to define what shall be considered treason under our government; and yet we are not to depend upon their plain construction, which was afterwards repeated by the legislature; but we are to resort to England, and take a system not in force, to borrow a definition extremely inapplicable to this country! Thus we are to defeat every object of our Convention, by introducing a distinction

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which does not and ought not to belong to the definition of treason, which every man does understand and comprehend.

But, Mr. Wickham says the construction of our Constitution, which is to be our only guide, must also be borrowed from rules of moral right, and is not to be governed by any artificial rules of construction. Here he has introduced a different word. His reason is, that the Constitution is a *compact*. I was surprised that such a word as this should have fallen from a man of his intelligence. A *compact!* Why, to be sure, it did originate in a compact; and so far as it relates to the union of the States, and its express operation upon them, it is a compact still; but, when it operates upon the Courts of this general community, it is the *law:* nay, it is declared in the instrument itself, to be the "*supreme law of the land.*"—Art. 6, sec. 2. This, however, is not very important; I only notice it to shew what errors gentlemen will and must fall into when they go out of the main road of common sense.

But let us avail ourselves of Mr. Wickham's golden key to unlock the Constitution. You must, says he, resort to the rules of moral right. Knowing the acuteness of that gentleman, I did at first suppose, that there might be some meaning in this remark; some reason which had escaped that benighted head which the gentleman had ascribed to me. I have no doubt but the Constitution is to be so unfolded as to convey the meaning which those who supplied the words, did intend. Now, I will ask, whether it could have been supposed to have been the intent of those who formed the Constitution, that a guilty person should have passed with impunity; and the instrument which he made use of to do the act, should suffer. Now, Sir, suppose this question was put to those who formed the Convention (of whom some of the counsel for the accused were members:) Is it your intention to exclude the principal in treason—he who is the projector of the traitorous plot—he who lays waste your country, although not present at the time, but prepares measures for its execution—shall he not be called a principal? Yes, Sir, they would have supposed (and a supposition in which it was impossble for them to have been embarrassed) that he who had projected, and, by whose means the plot was carried on, must have been the principal traitor. I certainly agree, cordially, that in the construction of our Constitution, all artificial rules of construction are to be rejected. But, Sir, although we may agree as to principles, yet, we draw different deductions. I presume, that in drawing our artificial rules, we are to be governed by the Constitution, and not to borrow from the most absurd and improper of all the systems on the earth; these rules will never apply to the present case. In Great Britain, it is totally immaterial where you draw the line between the principal and the accessary; for draw it as narrow as you please, it becomes all one; for the space which is not occupied by the principal, is supposed to be occupied by the accessary, and so *vice versa:* the punishment is the same to all persons who are concerned in the offence. But how does that distinction operate in this country? The gentleman has explained it to narrow the ground of guilt very materially, where a person was not present, although he was the *life* and *soul* of the trea-

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son. The result of this deduction is, that those persons are not to be punished, which the Constitution intended to punish as traitors. Now, Sir, in England, the definition of principal, depends upon the definition of accessary in a great measure; but Mr. Wickham wants to cut off half of the offenders, if not those who are chief in counselling;—by whose means, and by whose talents the crime is projected, and, perhaps, compleated. The Court has very distinctly said, that if the doctrine supported by Mr. Wickham, should be adopted, it must prove fatal in its operation. The Constitution defines the offence to be levying war. What have you to do, says Mr. Wickham, but to charge the accused with levying war, and you may take every person in this country to be an accessary, upon the broadest scale that accessaries are made in Great Britain; but, by this, you trample on the Constitution. Now, Sir, what is the true doctrine here? It cannot produce the punishment of all connected, if we use the English acceptation of the word "accessary;" for it can only extend to those who are leagued in the conspiracy, and who form a part of it; and it cannot extend to those who do no part in it. Nor can the man, who having joined in a traitorous meeting, and, who never goes to it, but repents of his iniquitous union, and turns from it, be considered a traitor, because he has performed no act: My doctrine will not embrace him. Here is a man, for instance, says the gentleman, who sees this party, but has heard nothing of them before: he says to them—gentlemen, where are you going? They answer—to New Orleans—What for?—To take possession of it; and, after that, we are going against the Spanish territories.—Well, if that be your plan, I wish you well; I hope you will accomplish your desires. So he makes them a present of something. Now, I should not suppose that this act would make the performer of it a traitor, because he performs an act, minute in its degree, and does not do it with a traitorous design. Now, this man, according to his own doctrine, would be an accessary before the fact; and in the same sense, a perpetrator of the fact. Foster does make some observations on this to be sure, but whatever they may be, we know that the laws of England made accessaries, before the fact, in treason, punishable with death, the same as the principal; and he is regarded to be as great, in offence, as the perpetrator.—This doctrine was so strongly argued to the Court the other day, that I need not trouble them with a repetition of it; but will merely refer to the principal authorities upon which I rely to support the position.—4 Bl. 39.—1 Hale, 626.—2. Hawk. c. 29, sec. 17.—1 Hale, 238.—Do. 435.—Fost. 361, 362. I will call the attention of the Court, particularly, to what Foster says about it: he contends, that there is some technical difference between them; but says that, in *foro conscientia*, the guilt of the one is exactly the same as the guilt of the other. It is so, Sir, in the present case. I will ask, whether this Court will make a distinction in the amount of guilt, (which is truly the same) merely because such a distinction may have been made by the common law? Surely, we cannot resort to the common law of England, and depart from the principles of sound sense and morality!

But, if we give him the benefit of the common law, presence is

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not always necessary to make men perpetrators of an act ; it is unnecessary for *me* to enlarge upon this position, because the Court have heard it elucidated in a much better style than I can pretend to. It will, however, be said, perhaps, (for a hint was yesterday dropt by Mr. Martin to that effect) that the *actual* presence of the accused at the overt act, has always been required, in every species of treason, except in that of compassing the king's death. This is not founded in reason, nor do I think it warranted in law. It is not reasonable, because of the requisition of the overt act being proved, upon the ground of the statute Edward 3d, as an evidence of the intention : It is necessary for the proof to be as precise in this as in any other species of treason, notwithstanding it may exist in intention. It appears to me to be in vain for the gentleman to distinguish compassing the king's death from other particulars ; for only he can prove that compassing is the intention and punishable : Now, the word would be nothing, if the overt act is not in part committed. It is not necessary, therefore, to bring in the absentees. Again. It is not true that in this treason alone, the intention may make the crime in levying war. The enlisting and marching of soldiers, is, in itself, innocent. What is it that can make it guilty ? The *intention* with which they are enlisted, and their marching and assemblage on Blannerhasset's island. Even if they had been armed there, in ever such numbers ; and even if they had shot general Tupper, it would not have made it treason in Mr. Burr. But what could turn this act into treason ? Why, Sir, the traitorous design. It is obvious from the evidence which we have produced, that in *this* levying of war, it is the *intention* that ought to be regarded : the overt act being only the effect of the intention. So in England, levying war is often given in evidence of the overt act of compassing the king's death.

The intention then being necessary in either case, there can be no necessity of the presence of the prisoner, in any way whatever. This I have said by way of anticipation of what Mr. Martin might advance.

We contend that though Mr. Burr might not have been actually present, he yet might levy war. This is a question of law and fact which must be left to the jury. I fear that I shall argue this case somewhat irregularly ; for, whenever that point is presented to me, it takes exclusive possession of my mind ; and I think that I ought to employ the whole force of my very limited understanding in controverting the principles upon which the position rests ; in showing to the Court its tendency ; and in pointing out the effects, if the motion should succeed. Because, if it does succeed, this Court will set the precedent of arresting evidence, and of deciding upon facts. The question, whether a man be a principal or not in treason (or any other crime) is a question of fact as well as of law. Now, we charge the prisoner with levying war : he says he is not guilty, because he is an accessary, and not a pricipal. Facts are stated to the Court, upon which they beg a suppression of further evidence ; stating that the court ought to decide upon the character of the crime and the weight of the evidence—and not the Jury !

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In making the question to the Jury to conform to our Constitution and acts of Congress; and say is the accused guilty of levying war, (after all the evidence has been heard) we certainly shall get rid of all the substitutes, refinements and distinctions of the common law, and the arguments of the gentlemen upon it. I confess it requires a mind infinitely more acute than mine, to state, or even to comprehend it; I am somewhat lost and bewildered in this intricate labyrinth of the law. I make the acknowledgment, because I have seen gentlemen more experienced and learned than I can pretend to be, perfectly lost in this labyrinth. I think, therefore, it will be enough if we take the plain Constitution, and decide it upon the principles of common sense, without resorting to the subtilties of law and old precedents; which a man may devote himself to the study of for twenty or thirty years, and at last, scarce be able to make himself understood in. I will venture to say, that, learned as Mr. Martin is, there will be scarcely an half a dozen men that will understand the scope of his argument upon common law, however much they may applaud him. Sir, let us have a standard of our own, without the perplexity of being mixed with the trash and rubbish of common law; and then shall we have a system that will meet the feelings, the habits, and the wishes of the American people, infinitely more than all the abstruse foreign law that can be introduced.

I said that the common law of England was not in force in this country. This perhaps ought to be understood with some degree of reserve. It is not very important that this limitation should be explained, since the concession made and taken by the gentlemen on the other side goes far enough, or perhaps too far. The Court will recollect that Congress, in 1789, did make a provision as to civil questions, but did not extend it to criminal. Now, the question, how far it does extend, is very important. It has been contended by very intelligent men, that the common law does exist in this country, in consequence of some technical terms being ingrafted in our Constitution. This doctrine is found in p. 67, in the report of the committee, by Mr. Madison. But, it is the common law beyond this limitation, that I mean my observations to embrace. It is certainly the case, that there are technical words used, for instance, "Jury;" and that the Constitution does not say what a Jury is, or whether it shall be composed of thirteen men, twenty-three, or any other number; but yet, according to the construction of that Constitution, we have it said, that twelve men shall compose a Jury, and that they shall be unanimous in their opinion. So with respect to the right of challenge, &c. All this seems to have sprung from the word "Jury" and its common acceptation and usage. As to challenge for cause, there is no direction, and yet the right is not doubted. This is grounded upon the reason of the thing: And so is the doctrine for which we have contended: that the Jury should decide whether a man is a principal in treason, upon the law and upon the facts. I say, Sir, whether the accused is a principal in the first or second degree is a question of law and fact, which the Jury must decide. What is the meaning of a principal in the second degree—the Court can answer without

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quoting any case; but by stating it, they do not assume to themselves the power of decision, which I have so strongly endeavoured to denounce. A principal in the second degree is not the perpetrator of the offence, but one who is near enough to give aid to the perpetrator. All these facts must go to the Jury before they can give a verdict upon the case; and *all* the evidence must go to the *Jury*, in order for *them* to decide upon the guilt of the accused. I, therefore, contend, that whether the accused be merely an accessary, or whether he be a principal in the second degree (and therefore, on the doctrine of Mr. Randolph, not punishable until the principal be convicted) yet, we charge him with levying war; and we have a right, upon that charge, to introduce all our evidence, for the Jury to decide upon the question.

This brings me to the second reason of Mr. Wickham; which is, that if the accused was guilty as a principal in the treason, he was only a principal in the second degree; and that being the case, no parole evidence can be brought against him, without the record of the conviction of the principal being first adduced. He referred to numerous authorities; but all that we can say respecting them is, that they relate to treason, and do not give a *special* idea, as to treason of the first and second degree. The doctrine which he supports is the same as respects a person guilty in the second degree, which is termed *derivative* guilt: and where the person so charged cannot be tried until the principal is convicted. I must here again be permitted to say, that this is a question of law and fact that belongs to the Jury. I hope the Court, as I wish not to repeat these words again, will apply this argument to all the positions laid down.

Whence, Sir, does this idea spring, that the guilt of the accused, in consequence of his absence from the spot, is merely derivative? The gentleman says, from the common law—a system which you and he says is not in force. It is not only from the common law, but from technical and artificial rules, not founded in justice nor in right. We have tried to prove, (and think that we have done it) that the principal guilt, in this case, falls upon the head of the accused, whether he was absent or present; and that all the guilt of the others was derived from him. Now the doctrine contended for, would unquestionably terminate in this result, repugnant to common sense, that the guilt of the leader cannot be ascertained, till the guilt of the followers is discovered and proved! This would be absurd. Now, suppose A was indicted for aiding B to murder C; it is manifest that A could not do this, unless B did murder C. Now take the gentleman's doctrine as it is presented by common law, what would be the inference? Why, this artificial complicated system of justice is inconsistent with itself. Derivative guilt, say the learned law writers, in speaking of treason, cannot be ascertained till the principal guilt is discovered. Now, this very same system, in speaking on the subject of principal in the first and second degree, rejects the principal, and expressly authorises the conviction of A in the above case, before B, who did the act. A is prosecuted, condemned and hung, when B is not brought to justice.—See 1 Hale 436.—Shall we then go to a system where the doctrine is not consistent with itself? Shall we borrow from that system, an explanation of our own Constitu-

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tion? In treason, according to common law, all are principals, and therefore the doctrine on which they rely cannot hold them out. This position appears to me to amount to a surrender of the question! I really wish I could exhibit my reply without making such a deduction, because it is not pleasant to me to tell a gentleman that he has surrendered his own position by his argument. The accused is indicted for levying war—what does the argument suppose? Why, that he did levy war: but he says he is the principal in the second degree, and his guilt is derivative! Now does not this argument surrender the point of fact? Is it not predicated upon the supposition that the fact is so? You have proved the war, but if I have levied war, it is in the second degree. Now, Sir, the Constitution nor laws know any thing about these degrees; and therefore, I am correct in making the inference; and the Jury must decide upon the guilt.

Chief Justice. I did not understand Mr. Wickham as saying that he did levy war, nor that a man who counsels, advises, &c. does levy war; his argument was that he does not levy war, but that the common law attached to such conduct the crime of an accessary, which therefore is a mere creature of the common law: that those who do certain things, which in themselves are not acts of levying war, but assisting those who do levy war, are accessaries. He argues that upon the doctrine of accessaries, which is a creature of the common law, the creature cannot exist without the creator. I did not understand him even to say that this was a case of accessorial guilt, but that it was not a case of principal guilt, and therefore it could not be tried until the guilt in itself was made to appear in the principal actor.

Mr. *Hay.* I may not have understood him, Sir, and therefore might have misrepresented him. But I did understand him at least to say, that if the prisoner did levy war, he did so in the second degree. I am inclined to think that my comment upon his argument was correct. I consider it perfectly immaterial, however, since I think it must appear clearly that he was a principal and chief actor, though not present.

Instead of examining the subject itself, however, let us enquire into the propriety of bringing forward now, at this stage of the prosecution, a motion to arrest the evidence. I conceive that motion, if ever it would be good in law, cannot be let in at this time.—1 East, 101, the very book the gentleman referred to for his authority, authorises the objection which I make as to the *time* of the motion. Is not the submission of the accused to trial, admitting his guilt to be derivative, and therefore admitting that he might have objected to his being tried until the conviction of the principal? Does not this deprive him of the power of introducing the objection at this time—after the Jury is sworn? 1 Hale, 623, is an authority that the principal and accessary might be tried together; and, therefore, a record of conviction cannot be obtained.—See also, 2 Hale, 224—and 2 Hawk. 303.—Now, hear, with respect to those who are entitled accessaries, whose guilt is properly derivative in its nature. The accessary, if he submits to trial, cannot after that require that evidence if the conviction of the principal should be produced. He may state it as a reason why he should not be put to plea, and conse-

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quently why he should not be brought to trial: but having now gone into the trial, he *cannot* arrest the proceeding. Such is the law with respect to *accessaries*: *principals* cannot object at any time. Now, Sir, by a declaration of this objection being too late, I ask what inconvenience is sustained by the accused? Suppose him to be entitled to the benefit of the law; where is his hardship? He can now have a fair trial; and unless the person from whence he said he derived his guilt should be convicted of the offence, he cannot have judgment passed upon him, but receive the benefit of arrest of judgment.—1 Hale, 623.—Now, according to our Constitution, he must be charged with levying war: if, therefore, the accused wished to avail himself of the objection he contends for, he ought to have first brought it forward. This is the rule in Great Britain—if a derivative offender wishes to avail himself of this objection, he objects at the outset: he makes objection to going into trial at all; and his objection might operate fatally to the case going before the Jury; but this is not after the Jury are impannelled. Now it is remarkable, that the gentlemen try to avail themselves of common law rules, which they, in another breath declare not to be in force: but if they do think so, it is declared that the objection must be made before the trial begins. But here, in the middle of the trial, a motion is made which might operate to discharge the prisoner for want of that evidence which we are not permitted to give. But this cannot be.

It may be said, perhaps, that the indictment ought to have charged the defendant with levying war, *being absent*; for then he might see the situation in which he stood, and might have known that he could require the record of conviction of some one principal who was present. The answer to this remark will be found under the third enquiry. I shall show that it is not necessary, in this country, that the indictment should state this circumstance with such precision. I have always viewed it as a principal no less sacred than proper, that all evidence should be heard by the Jury: if the prisoner says that there is a point which must be proved previous to his conviction, he is not at liberty to stop in the middle of the trial, to introduce it, but must let the evidence go through. I call upon the gentleman to prove a single case where it ever has been done, or where such a principle was ever justified upon sound law and propriety.

The third position laid down was, that the facts must be proved; and as the indictment charges the prisoner with levying war on Blannerhasset's island, evidence which does not go to prove him to have been on the spot at the time, must be inapplicable. On this ground, a motion is made to stop the evidence. But, Sir, if we even admit this reasoning to be true, and that the evidence would not prove that he was there, it does not follow that the evidence is not to be heard. The objection can only be effectual when the evidence has been all submitted to the Court and Jury; for without hearing of the whole evidence it is impossible to decide upon the relevancy to the indictment. It may, or may not, prove the charge in the "matter and form of the indictment." This depends upon the examination of its materiality by the Jury.

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But if the fact is proved, it is necessary that the indictment should specify his absence; else how can you bring evidence against him as though present? The evidence must be applicable to his being on the spot where the crime was charged. It will be necessary to examine the doctrine and rules more materially, upon which Mr. Wickham supposes himself to be so confident of success: and to see whether it is necessary to charge a man as being absent, if it be the fact that he was absent at the time. Now I would ask whether a man can be less a principal in an offence, because he was not on the spot, if he originated and carried on the treason then in operation? How can his absence justify him, according to law? The accessary before the fact, who was never on the spot, might be convicted.—1 Hale, 214, 238;—1 East, 127.—The charge is, that he levied war; the time, place and object is mentioned, and that is enough, if his intimate connection with it is proved. Gentlemen say, that the indictment ought to be drawn with such certainty, as that there is no possibility of error; and upon this ground also he contends that the accused ought to be informed. Now, Sir, do we not describe the offence, the time and the place? This is all the requisitions of right and justice. What use is it for us to conform to their objection, and say in the indictment that he was absent? This is only informing him what he already knows, and what we shall not controvert. Now let us ascertain whether by this common law authority, this species of certainty must necessarily be required in the indictment; or whether, applying it to our own understanding of propriety, this indictment is not sufficient. Are we to exhibit such an indictment as was never before presented to a Court of Justice? Foster, 194, says, that all that can be required is "a reasonable certainty, so that he may be apprized of the nature of the charge; and be prepared to give an answer." Now, Mr. Wickham does not say, that we have not described the offence, only that we have not said whether he was absent or not. This is not necessary in law nor common sense, because the man himself knows that he was not present. The charge is, that he did levy war with a certain view; and it is not necessary that we should tell the accused where he was at the time.—1 East, 125.—Now, Sir, Blannerhasset's island is in the county of Wood; one of the most remarkable and distinguished places in that county. Now, suppose the evidence should prove, that instead of the treason having been committed on Blannerhasset's island, it was committed in some other part of the county of Wood: say forty or sixty miles from it. Now, would not the indictment be good? The law says, that you are not bound to prove it at the spot laid, but you may prove it at any other place within the county. Now, Sir, if I had not mentioned this, I ask, whether they would not have used language like this: you charge me with levying war on Blannerhasset's island; I had some business to do to be sure on Blannerhasset's island; but instead of your stating the circumstances that occurred there, you go to the farthest corner of the county; this is taking me by surprize then; and how can I answer? But, Sir, what says the law? It will not admit of these captious objections, either to the indictment or to the evidence; and, therefore, if you can prove the crime any

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where in the county, it is sufficient. Now I ask whether the variance which I have now stated would not be infinitely of more importance than the one objected to? The cases I referred the Court to before, go to support the doctrine. Again; 9 Coke, folio 119.—A, is a case to point. So also is Foster, 351, as to identity. Now from this the question is, whether Mr. Burr was guilty of the procurement; and thus of the levying the war which was levied.—See also Fost. 437, 438.—

What would have been the effect, if we had adopted Mr. Wickham's mode, and agreeably to his opinion, made the indictment special? Why, we should have been involved in a difficulty and dilemma; because it would have been proved that the person who levied war, was not at Blannerhasset's island. How could such an indictment have been formed, in order to have made the guilt appear? Why we must have said that though he was not present in person, yet he was constructively present: and that he was so near as to act in co-operation with the people who were on the island.

I do and will declare, that I believe no indictment was ever yet formed, which stated that the accused was not present at the time. In East, 121, which I quoted, it does not appear necessary to say more than that there were a number of men met together for purposes of hostility, and with intent to levy war against the United States, having all the prerequisites to accomplish that object. I, therefore, cannot believe that any objection can be sustained. And even in Great Britain, these captious objections are not encouraged.—2 Hale, 193.—I certainly think it proper myself, that every man who is brought before a Court of Justice to appear to a charge, whether it affect his reputation, liberty or life, ought to be informed of the nature of the offence, so that he might be prepared for his defence. This is founded in common sense and humanity. But let us go to the indictment, and see whether it does not apprize the accused of every thing which an accused man can desire. The ground upon which he was brought before this Court every man knows; and every information or requisition of law and propriety has been given to him.

I stated to the Court that I should not say any thing with respect to the merits of the fourth position laid down, to wit—that the assemblage on Blannerhasset's island was not an overt act of treason; and, therefore, that all evidence relating to it was irrelevant. I did, however, say, that I would refer the Court to two or three passages of the opinion delivered for commitment. "What is meant by the *actual* employment of troops, is the embodying men, or levying troops to make war." It has been observed, that to constitute this crime, troops must be embodied; and that it cannot be consummated without the war is made: that, therefore, this must be a circumstance of notoriety, or no war could have been levied. It was also said by Mr. Wickham, that if the doctrine for which we contend should be sanctioned by the Court, the precedent would be fatal to the liberty and happiness of this country. He really seems to be alarmed at our temerity, and would make us believe that we are endeavouring to demolish the very citadel upon which our rights depend.

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confess that the zeal and pathos exercised upon this subject has had a very considerable impression upon my mind: It has had the operation of inducing me particularly to examine the doctrine minutely, to see whether it would lead to those consequences. I have reflected upon, and traced the operation, with an earnest desire to discover if any public mischief could be apprehended; but, Sir, I must honestly confess, that I could discover no such evils. And yet the gentleman in the height of his zeal, says, he trembles for himself and for his posterity: anticipating dreadful events! Now, Sir, I am a citizen of this country as well as he is; and I have a family to regard as well as he has. I am as solicitous for the welfare and happiness of my family as he can possibly be for his; but I am perfectly willing to risk my life and happiness, and that of my posterity, upon the consequences of adoping the doctrine which we have contended for. *Let them avoid any traitorous acts: let them not do any overt acts of war against their country*, and they are *safe*—they *never* can be hurt. There is not in this country, a single citizen, that has the least reason to tremble for either himself, or his posterity, whilst he acts right; every man may feel perfectly at ease, when he sees that it is a question which cannot concern any inoffensive character: it can be productive of no danger to him, or to his family, whilst their conduct is honest and consistent.

But, there is another degree, which the gentleman did not see, or did not choose to see, which is infinitely more alarming: It not only attacks our Constitution, but the very bulwark of our civil liberties: tear down this bulwark, upon which depend our property, life, and every thing that might be called dear to us, and all is lost! This is a point of view in which this subject ought to be considered. And, as I said before, it is better to keep a thousand miles on the safe side of the line, than to pass a single inch over it. The moment the line is passed, the happiness and peace of your country is at stake, and you commit an error which cannot so easily be repaired. It is time the gentleman should think about the rectitude and strength of his doctrine: he has heard the argument which I have delivered; and I appeal to his candour and his understanding, to say, whether such a consequence as he declared, could ensue, or whether he was warranted in his deductions.

In his concluding remarks, the gentleman addressed the Court, and said, that if we could oppose his doctrine, it must be in such a way as to render the Constitution a dead letter. Sir, have we done so? Have we not vindicated the Constitution to its utmost extent? Have we not preserved it in its purity, and called for any and every possible construction of it which would save it from doing any injury to our country from traitors? Sir, if the gentleman had sufficiently known me, and consulted his own judgment and feelings, he would have pronounced, that rather than I would advance a doctrine injurious to my posterity, I would perish by a thousand deaths. Can I possibly commit a crime so heterogeneous to my sense of humanity, as to suppose or wish that a man shall be convicted of a crime which he never committed? And yet this is the language of the misplaced zeal; but which, I can hardly suppose, escaped from the heart of that

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gentleman. I presume that his feelings and his judgment would forbid such an idea.

Again: He observed, that if we did oppose, we must tread in the steps of a blood thirsty *Jeffries*; and of an unfeeling *Coke*. Sir, have we mentioned his name? Have we quoted his opinions? Have we attempted to advocate his doctrine, or have we relied upon such authority? No, Sir, I would not: I unite—I most cordially unite with the counsel on the other side, in handing down his name with my strongest expressions of abhorrence; he *well* knows that there is no man in the country to whom such a character is more abhorrent; and who holds his infamous conduct in more contempt: I never hear or mention his name without abhorrence: nor do I believe it is ever mentioned in this or any other country, but that it is despised most cordially and universally.

Sir, we have not adopted such horrid principles, and we despise treading in such footsteps; but let us not be blamed for wishing to see a fair exposition of the law of our country, and endeavouring to explain it according to the best of our capacities. I may be mistaken in my understanding, but I must close my remarks by declaring, that I have not yet heard any thing which induces me to discover that I have been mistaken in my views of this subject. If I am mistaken, it is from a want of knowing how to be correct—but I believe myself to be correct; and I am sure that not one single argument which I have heard has wrought the least conviction on my mind of the correctness of the other gentlemen.

Mr. *E. Randolph*. I had intended to address the Court in reply; but the truth is, that the debate has been carried to such a great length that I cannot intrude myself on your honour's patience. I have no doubt but Mr. Martin, from what I know of him, will address you to the point; and, therefore, I shall content myself. But there are some things which I am extremely desirous should be understood—some things which I have heard to day, which ought to be answered. If, therefore, Mr. Martin does not take up some points which I have this day noticed; and, particularly, as to arresting the right of the Jury, I certainly shall consider it my duty to address the Court. I believe, however, that my ideas will be forestalled; which I shall have no objection to.

Mr. *Martin* expressed his desire that Mr. Randolph would express his opinion upon the subject.

Mr. Lee,

May it please your honours,

At this moment, I rise very reluctantly, and therefore it is proper that I should ask considerable indulgence and allowance; as it will not be expected that my arrangement will appear so perfect as I could wish.

When this proposition was made, I considered it an order, and common course in legal proceedings, to object to the admission of testimony which did not bear upon the case. Before the motion was proposed, it was announced, that witnesses of a certain description were about to be examined. Objection was made to the admissibility of such testimony. It would seem, however,

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that in this case, no circumstance can occur, without being transformed in some way or other, so as that it is rendered different in its appearance. The gentlemen who oppose this motion, although they may seem to be experienced in the practice of law, yet declare that they have never seen such a course of proceeding as is now proposed to your honours: but I am sure, if they have had much practice, they must, or can inform you that motions of this kind are constantly made; and however objected to, if reasons sufficient are given, the Court decides affirmatively.

You are informed, that the power of the Court does not reach so far as to enable them to decide upon such a question; and that by it, you are about to invade the main bulwark of your liberty: for that by it, you usurp the province of the Jury, which is to decide upon facts. Are not the objections already made, sufficient to satisfy the advocates themselves, that they are fundamentally mistaken in their doctrine? We say, Sir, and we declare it upon legal argument, that you are not called upon to decide upon facts. Can it be supposed, that errors of that kind could be made by gentlemen a little experienced in forensic controversy? We call not upon the Court to decide upon any fact: we call not upon them to take one inch of right from the Jury decision in this case. Let our motion be what it may; carry it to the farthest extent; the Jury must still render their verdict: a verdict upon the law and the fact, however they may contend that we controvert the doctrine. Our motion has been misunderstood; and it being so, I do not wonder that it has been so much misrepresented. We have no desire to exclude any *legal* testimony: we only call upon the Court to refuse what is not legal: and yet, the gentlemen have made repeated declarations of our design to invade the province of the Jury; and to give your honours a power never before exercised. Let them produce all the evidence that they can, which will go to substantiate the indictment, and we shall agree as to the propriety of its admission. But because we do not agree that all the expressions and practice of ages ago shall be allowed; and that irrelevent testimony shall declare things which have no relation to the indictment, we are charged with innovation upon rights and justice; and with attempting at the prostration of every thing that is dear to our country. How the gentlemen could suffer their imaginations to take up the case in this point of view, I am really at a loss to conjecture.

When we made our objection to the introduction of certain testimony, we stated our impressions to the Court in four positions. If I may be permitted to use the figure, these positions are four roads that lead to the same place of destination: which is, to reject illegal testimony, and no other is required to be rejected.

But, say the gentlemen, can the Court stop evidence! Yes, but improper evidence only. Sirs, we call upon you to stop illegal evidence being heard: and if the Court cannot stop illegal evidence, we ask who can? No, it is the common practice for Courts to stop illegal testimony, not only in civil, but in criminal cases. Permit me to say, that the rules of evidence in civil and criminal cases have very little distinction. It is belonging to the Court: it is their natural province, to regulate *all* proceedings during a

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trial; and I know of nothing, whether it respects property, liberty, or life, that can prevent the interference of the Court in matters of law or fact with respect to evidence.

But you are told that you are called upon to do to-day, what a distinguished Judge was brought before the Senate for doing; and that his charge was the same as your conduct would now be, were you to decide. It was kind, very kind, indeed, in the learned counsel to remind your honours of what you already know; and which by none of us can be very soon forgotten. But here it is held up *in terrorum* upon your decision.

Mr. *Hay*. Surely I think that there never was such a thing said. What I said was in order to correct an observation of Mr. Botts's (if allusion is made to that) to shew that *that* was *not* our ground. I never should have mentioned, or thought of it, but to put Mr. Botts right. I had not the most distant idea that it would have been construed as it has been. I, therefore, think it incorrect in the gentleman to make the allusion.

Chief Justice. I do not consider one syllable as having any personal allusion.

Mr. *Lee*. I know not how I am to understand gentlemen; but when we are alarmed, alarmed, and alarmed so often in the course of a single debate, what am I to think of the orators? Am I not to repel every thing that is represented as dangerous, when, in fact, there is no danger? when I hear admissible testimony denominated improper testimony, am I not to retort upon it? when gentlemen so lose sight of ordinary questions as to make them extraordinary, I consider it my duty to place their misapplications before the Court. If they attempt to make the Court believe a question differently from what it really is, I think it proper to place the impropriety in a full view to the Court.

I will proceed; and I hope it will be satisfactory to the gentleman on the other side, that I have passed over some things which might have called for some sort of a reply. It is not my intention, Sir, to misrepresent any gentleman's argument: and I considered my reply to that gentleman's argument to be perfectly in order.

You are called upon, Sir, to decide upon our objections to the testimony which we have said is irrelevant. Have you the power to decide upon it, or not?—Is it infringing the rights of the Jury, or not, for you to decide? Can I illustrate it? Is it possible for me to shew cases which bear in favor of my argument upon this case? are questions which relate to my declarations and my duty. I contend that it is as much the duty of the Court to decide upon this question, as to exercise any other power that belongs to the Court. The question then first is, what will the Court, in a legal sense, interpret levying of war? when the Court have given this interpretation to the Jury, they must decide, whether the facts have been given in evidence to support the charge. It seems to be thought that in treason, there is a general exception to the former established rules giving a power to the Court to decide upon the evidence: but permit me to say, that, if there be such an exception, it is the first time that ever I heard of it. If a question be put to the Court in a case of

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burglary, what constitutes that crime? why, the Court would be the competent authority to give the definition—they would describe it to be breaking and entering an house in the night, and putting persons in fear: it would make a felony. Suppose the person was indicted for burglary; and the evidence was, that the house was broke and entered, not in the night, but in the day time—suppose the Counsel were to admit that it was not entered in the night but in the day, and therefore they would go on to prove that it was the intention of the prisoner to commit felony and to put persons in fear, although he was indicted for burglary; and the indictment read:—now would not the Court stop the prosecution, if that is the crime stated? would they let gentlemen go on? No, Sir, because it would be irrevelent to the indictment: it would compel the Jury, witnesses, and all the officers of the Court to be attending and losing their time to no purpose; and I am sure that any Court would stop testimony of that nature.

This doctrine has been illustrated under the designation of gaming, maim, &c. But I will endeavour to bring a view of the subject more close by supposing that the present indictment were for a riot. "A riot" (according to the legal definition of it,) "is where three, or more, actually do an unlawful act of violence."—4 Bl. 146 and 3 Inst. 176.—It was proved that there was an assemblage of persons: a peaceable assemblage; but that Col. Burr was not there.—Now, Sir, would a Court suffer it to be proved, that, though he was not there, yet he was (somewhere or other, no matter where,) aiding and abetting the riot? an aider and abettor of a riot cannot commit a riot: he must be *personally* present; he must be an *actor*. (And here I will say that there *cannot* be accessaries in a misdemeanor.) Now, if that be the established law, (which we can prove it to be,) how could an indictment for riot, when he was absent, allow of testimony being produced of his *intention* to commit a riot; or of his procurement or aiding such a riot? Certainly it could not be permitted. But, suppose this act of riot were proved to be a mere assemblage of men; and that there were no act of force at all done—"but," say the gentlemen, "though this assemblage, where Mr. Burr was not personally present, committed no act of violence whatever, yet, if we are permitted, we will show you that they *intended* acts of violence, but they were stopped before they were able to commit them." Why, Sir, you must stop this, because it is perfectly irrelevent to what is before the Court, either as to the situations of the circumstances or the case, which a comparison will clearly evince.

Another consideration, which is of considerable force, and which ought here to be applied to the case is, that it has no relation whatever to an unlawful assemblage. If it were an unlawful assemblage, I will hold it to be clear law, that no man can be found guilty for being in that unlawful assemblage, who is absent, because his absence places him upon the ground of innocence. Now, would it not be absurd to suppose that a man ought to be punished for being in an unlawful assemblage, when it was proved that he was not within 100 miles of the place? But it is said, that he was not only not there, but, not in the same

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state at the time. Would not the Court then say that it was *sine qua non* to pretend to prove that he was an offender? If it had been proved or admitted, that he was present, the question would have been different: that not being the case, the Court must stop the testimony, on that subject, because it would not apply to the indictment. I trust they will think that they have the power to do so on the present occasion.

The Court are not now called upon to decide upon facts, but they are called upon to exclude such testimony which cannot have a bearing upon the case in issue; the nature of which testimony has been declared; and which evidently is not applicable to the indictment.

I conceive, first, that according to the proof which has been produced, (which they say is all that relates to the spot laid in the indictment,) it was an *innocent* assemblage at that place; and if there was no crime committed by the persons themselves who were upon Blannerhasset's Island, it is impossible that it could have been committed by any persons, who were absent from that place at that time. The facts being stated in evidence, a question of law arises—Do those facts make a levying of war? If they do not, should the Court suffer testimony to be produced against an absent man, which might tend to convict him of a transaction where he was not personally present? The first question then is, whether this assemblage was an innocent, or a guilty one. the next, whether it could be called levying war, or not; and the third, whether a person absent could be implicated in that assemblage, whatever it might have been? It is now proper to enquire whether it is, or is not the province of the Court to decide?—Is this assemblage, or is it not, an *overt act of levying war*, the facts being true as stated? When gentlemen speak of proof that they mean to introduce, they must relate to the conversations and declarations of Col. Burr in another State, and at other times than this circumstance, (whatever it might be) at Blannerhasset's Island, or they must prove his presence, otherwise their testimony will be irrevelent. We do not agree that it is admissible to hear any such testimony. It was justly said by a gentleman concerned with me, that words are not to be considered as any ingredient in treason: that there must be, either a confession in open Court, or a proof of the act agreeably to the Constitution, to constitute the treason. We are well aware that words which accompany any act, shew the intention with which that act was done, if it can be supported by evidence: but *words* or *acts*, in other *times*, and in other *states*, and at other *times*, from *where* and *when* the charge is made respecting a transaction, ought to be excluded. As to any act of Col. Burr elsewhere, we object to any evidence being produced; because we are told in our Constitution and Law, that every trial for a crime "shall be held in the state (or district) where the said crime shall have been committed."—3 Art. Sect. 2, Const. U. States.—If therefore, in Virginia there has been no levying war, and the indictment shall specify Virginia as the seat of the war said to have been levied; and if gentlemen should even prove that war had been levied in Kentucky, or in New Orleans, we should object to it; because it would not relate to any charge made in

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the indictment, or within the reach of this Court. If it were treason any where, it must, under our Constitution, be treason where it was committed. This, then must necessarily be a matter of fact, upon which the Court must decide, and which the present motion embraces.

I will make a few remarks to your Honours, respecting the different positions which we have taken; and, in taking them, I will proceed in a different order from that taken by the gentleman who so ably opened this defence; and, in the first place, call the attention of the Court to the legal phrase of "levying war." I shall then take up the law as to the *presence* of the persons accused; because, if there was no levying of war in Virginia, and he was not concerned in levying war at all, no evidence ought to be admitted on this indictment. We shall contend, that all the facts, taken in their most odious interpretation, do not, in their legal sense of the words, amount to levying war, even by those who were present in Wood County. In order to constitute "levying war," we suppose that *acts* are necessary to be proven: and acts of a very different nature from those insisted upon by the Counsel for the United States. I think I can plainly shew, the definition of Mr. Hay is not full or correct. He says, that where there is an assemblage of men collected, with a treasonable intention, with a force, intended to be employed for that purpose before their dispersion, it is levying war: and such a doctrine he supposes was held out in the decision of the Supreme Court. That this is not levying war, and that this was not the definition of the Supreme Court, I shall shew.

Levying war is, in its nature, *public*. This I shall press, and upon this I shall depend, that it is altogether a *public act*: not a part of it in the heart, and a part of it in the open deed. The ordinary acceptation necessarily supposes open and actual violence: a military array, a posture of war, ready to act for the purpose of violence in a public way. If there be no actual public violence, nor public posture competent to commit violence, then, I say, there can be no levying war, under any circumstances whatever. I hope that I am not misunderstood here: that I contend for the absolute necessity of a collection of a great multitude of people, with military weapons. I will admit that there may be a collection of people with clubs, and met with a public predetermination to change the government, so as to render actual *violence* unnecessary. Mr. Hay has supposed, that a number of men had collected for the purpose of overturning the government; and, though they did no act of violence, yet had their numbers and appearance obtained their object, would it not be foolish, said he, not to pronounce that levying war? because such an appearance would supercede the necessity of actual violence! Sir, *war* speaks its own language, and speaks it by *open deeds*. It may be called an act of violence, by a declared intention; if corroborative circumstances concur, an army may be armed, arrayed, and marching under the determination to separate the government: it may be by a multitude of people whose hostile appearance carries terror wherever they go. It is in this way, or some other as apparent, that war speaks its own language: but, unless there are some such appearances, which

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no man can misinterpret, it cannot be called levying war, in a law sense. It is a mistake, if the gentlemen suppose that we contend that levying war cannot take place without the existence of actual *battle*. *Bellum percussum* and *bellum levatum*, are terms well understood in the books, and we cannot mistake their distinction. It is really remarkable, when the gentlemen go to speak of the word *war*, how meek they are. War, they suppose, may consist in an assemblage of people, without any avowed intention, violence, threat, terrific appearance, or any thing like it: but there is an assemblage of people, and they can prove that a particular person has been the means of calling them together—though not one of them knew any thing about levying war! I say, Sir, it is necessary to prove that this assemblage had an intention to subvert the government of the United States; and that intention ought to appear manifest from their acts, at the time and place specified in the indictment; and, unless the testimony that is offered, shall go to acts of that kind, it is irrevelent to it. We had a learned exposition on this subject, drawn from the British authorities. Authorities, Sir, on the branch of treason denominated "levying war," are very few; and it is no wonder that gentlemen should be so confident in their doctrines, if they are mistaken in the main description of their subjects, by calling it levying war; when, in fact, it is that branch denominated compassing the king's death. The cases of treason have been very few, of late years; but, few as they are, they all relate to actual rebellion; and, indeed, it has been truly said, that there is not an instance of levying war, charged in England of late, but where the person is proved to have been guilty of, or charged with actual rebellion.

American authorities have been resorted to. We happily have but few cases in our country; but, few as they are, it is well known to the Court, that they were cases where actual rebellion was in progress. Of the cases in 1793 and 1798, in Pensylvania, it never was considered as possible that there would be an idea advanced of a *legal* and an *actual* presence, in levying war: it was not supposed that, in treason, there would be such constructions. No, Sir, it is a construction which has arisen upon the present occasion; and it is now, for the first time, announced to the American people, that a person who is not *actually* present, and who takes no part in a rebellion or treason, may be, notwithstanding, convicted; because he was legally present by this construction. What says the gentleman? You strictly watch the construction of our Constitution and laws. Sir, I would rather say, open the door of construction, and you must admit of every thing; but, if you explode it, there can be no danger of a man who is absent, in fact, being construed to be present in law, or of any other constructive treason being admitted. I have all confidence in the Court, that they will hear every proper evidence and argument, and that they will determine upon all the principles which the law shall support them in: but not upon principles of construction, which may endanger the safety of the American people.

It was intimated, (and here I again express my regret at not being able to follow the argument in its proper connection, or to

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bring forward the ideas as they have been exhibited to the Court,) that the principal ingredient in levying war, consisted in the *intention* only ; and that, if the *intention* was once proved to be to levy war, a small matter of *open deed* would be enough to satisfy the Court that war was levied : but that same open deed, to exhibit the intention, was necessary. Here, may it please your Honours, I must express my pointed dissent from the doctrine. I say, that there must not merely be an *intent* to subvert the government, as an ingredient ; but, that there must be some public act of violence, or some public posture of defiance, and forces ready to act, by which the *intention* must be known to be the deed avowed and determined by the persons. These are not little matters, which the gentleman makes mere appendages to levying war. I therefore must repeat, that it consists in open unequivocal acts of war. I will not confine it, as the Counsel do, to mere threats ; but to acts of force and violence, carried into effect by a multitude of persons, met together for that especial purpose.

Upon the question of what is levying war, the counsel have laid hold of an expression in the opinion of the Supreme Court. They have frequently resorted to it; and have laid hold of particular sentences in that opinion, from which they have drawn a deduction that it is exactly what they have described it to be. Your honors know, the jurisdiction of the Supreme Court is confined entirely to civil cases—that it is an Appellate Court, and has no jurisdiction whatever over other courts in criminal cases. They have, in two instances, fixed the principle, that they possessed no criminal jurisdiction, except where persons were brought before them by *habeas corpus* : or consequently, their decision cannot be of that authoritative nature as that which exists between a superior and an inferior Court on criminal questions. Undoubtedly this Court will pay much respect to any opinion which emanates from so high an authority as that ; but, I must suppose, that they will not consider it as a binding authority, as the gentlemen suppose. But, Sir, let us look at the opinion of the Supreme Court, and see whether it may not be understood to be perfectly consistent with what I have advanced as the meaning of levying war. The gentlemen will forgive me, if I tell them that the opinion does not lay down the levying of war at all. To be sure, it goes to establish a point, (so far as they had the power,) without which, they have unequivocally declared, that there can be no war levied. But because they have taken up one point, relating to another person, it is said, (but erroneously) that they have decided what is levying war ! When Mr. Swartwout's case was before the Supreme Court, the counsel who took his case in hand, contended that there was no evidence that charged him with any crime ; but, especially, with high treason. They did not think it necessary to discuss the doctrine of treason before the Court. There was no proof of the assemblage of men, although it was *said* that there were great bodies of men assembling. It was asked on the part of Mr. Swartwout, shew us the the *time*, the *men*, and the *act* which could possibly constitute *levying war ?* They could shew neither ; and therefore, they failed.

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In order, however, that the Court should not be supposed to have confounded themselves, (not having taken up the subject,) I will appeal to the opinion itself; which upon a critical examination, will not appear as has been supposed; except they have a right to lay hold of a few vague expressions, so as to make the Court pronounce to be law, what no body ever supposed could be law. The Court expressly states that their opinion was formed upon the principle before laid down by the most eminent Judges of the United States. They declared, that they were not making treason, but declaring what had been before designated in our own Courts. And, should the loose expressions of Judges Chase, Patterson, Iredell, &c. be taken as authorities? No, Sir, the connection should be viewed: its uniformity is to be examined, and its correctness too, from other decisions of a like nature. It is in uniformity with the law as laid down by Patterson and others, that the Court declares that they are about to decide what is levying war. This is seen in 2 Dallas, 355—There was an actual rebellion in that case; and it will by no means authorize the position of the gentleman.

They seem to suppose, that the opinion of the Supreme Court authorizes them to suppose their position correct: because it says, that an assemblage of men, met with intent to commit treason before they dispersed, is levying war. But, did they not also lay down the principle, that one man *could not* levy war, even if he were a Sampson? In the trials in Pennsylvania, they assembled—they marched—and they even terrified the public officers from executing their duty. If the opinion of the Supreme Court had reference to such circumstances as ingredients in the article of levying war, then we perfectly coincide with their doctrine. With respect to Fries's trial, there was an actual rebellion.

Mr. Sitgreaves in page 19 of Fries's trial, has described what is treason by levying war:—"A tumultuously raising the people with force, for the purpose of subverting, or opposing the lawful authority of the government, in which those insurgents have no particular interest, distinct from the people at large." *It* must be war. It is not, therefore, a secret assemblage of men, with a design secretly to do the act: It must be a body of men collected, sufficient for the object, either with or without arms; but if without, or if those arms are not used, that they must be ready to be used at discretion: and therefore, they carry terror with them wherever they go. We need not examine into British authorities merely, because the principle must prevail in all countries: for what appears must be known, and we cannot be wrong in our ideas of it. Whatever might be said by the Supreme Court, they having no case before them, could not decide as though they had. But what does Judge Chase say in Fries's case, p. 196? Although he uses more words, yet it does not appear that he means to go farther in his doctrines than Judge Patterson has done: it is one and the same principle in substance, and the occasions were nearly the same in Fries's and Mitchell's cases. Let us look at the opinion of the Supreme Court again, in which they treat of those cases, and see to what extent they went, or intended to go. In one part of that opinion, the Court expressly makes a distinction between

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" levying war," and *conspiring* to levy war—Sec. 5. I understand the doctrine to be, that a *conspiracy* without an *act*, cannot be levying war. Again: Sec. 6, the Court say that all those who " perform *any part*," &c. are traitors: but did the Court mean that a man who performed *no part* should be considered a traitor? No, Sir; it intends the man must *do* something in the traitorous act. Take the whole sentence together, and our doctrine will be supported by it. Again: The Court wishes to exclude doubtful cases, and to prevent construction: they are desirous that their definition should not be flexible: it is given upon sound reason, and guardedly expressed, if you examine its whole contents maturely. The Court meant to state, that it was *necessary* there should be an assemblage of men for the purpose of overturning the government of the United States in New-Orleans, by force; which, if carried into execution, would amount to treason—Sec. 8.—How carried into execution? Why, certainly by using actual violence—by a number of persons moving for a known object, and treading underfoot all constituted authorities. Farther than this, the Court did not intend to go: they did not intend to say that twelve or fifteen persons travelling in waggons, boats, or the like, without a single appearance of war, should be considered to levy war. Indeed, in other parts of this opinion, the Court have expressed doctrine in direct opposition to such a principle. When a parcel of boats happen to meet together, they, like waggons travelling to a certain destination, set out in squads, on account of keeping company with each other: And where can be the harm of such assemblages—even for *any* object, much less for an object innocent in itself? Mr. Hay has carefully omitted saying any thing on this subject. However, if any observations, interpretations, or omissions shall be made, on either side, I have not a doubt but the Court will duly appreciate them.

Before we part with this point, however, it will be proper to enquire how it does belong to the Court to decide upon this question; and how they come by the right of expressing their opinion of what is the meaning of *levying war*—(see Fost. 255.)—Here I may truly call upon the Court, as to its proper province, and ask, whether we are breaking down that inestimable barrier of *trial by Jury*. Here it is the province of the Jury and of the Court to judge on the case.

Those facts which have been stated, with respect to levying war, are of four boats, with about thirty men, and four or five rifles; all these men were of peaceable behaviour; and the boats were at Blannerhasset's island. These, with the other circumstances, (equally trivial,) make a case which we submit to the Court—to know whether, if we admit them all, it can be called " levying war?"

The first position which I shall now mention, is, that the presence of the party accused, is, by the Constitution of the United States, indispensably necessary, in order to make him guilty of the fact of levying war. Upon this point, I shall lay down this broad doctrine: That there is no treason in this country but under the Constitution; and when I lay down this, I will lay down another, which will convey my ideas in a very few terms: That

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there is, in this country, no common law treason whatever. Whether, therefore, there can be any other species of treason, except that laid down by the Constitution, will hardly be questioned; because I read in the Constitution, that "*only*"—"Shall consist *only* in levying war against them, or in adhering to their enemies." This definition, then, certainly excludes every other sort and species of treason. To advise or project levying war, cannot, therefore, be treason under the Constitutional definition.

But, says the gentleman, levying war under certain circumstances, is common law treason. I answer that our Constitution has not recognized common law treason: it does not even abridge it; but excludes all common law doctrines of treason altogether. It is said that our Constitution was made for the people of the United States, and that the common law of England is no law of the United States. Now, Sir, if to advise levying war, is a treason created by the common law, and common law is no more existing in the United States, how can it be said to have transformed this into treason in the United States? According to the decision in Worral's case, there is no part of the common law that can have cognizance; nor is there a part of our Constitution that adopts such a principle, or that accessaries in treason should be traitors. If there be such a passage, let it be read. Nor, Sir, has our Constitution adopted the principle, that there is no accessary in treason. It admits of accessaries in all other crimes; and, therefore, as it does not admit of construction, it cannot be inferred. I will lay down the position in these words: That the Constitution, touching the crime of treason, is not drawn in affirmance of common law; but, that it is an abridgment of the common law respecting treason. Or otherwise: It has taken its own ground, independently and abstractedly with regard to treason. Here, I call your Honours' attention to the statute of Edward 3d. You will find, that although that law speaks of treason in the same way which is transcribed by our convention, yet, that it has extended its definition to common law treason, or accessorial treason, which have not been adopted here. It is not reasonable that this or that definition should give us a rule to direct our Courts into the meaning of treason. The statute of Edward 3d, is broader than ours; and yet the doctrine of common law *must* take that statute for its basis, although it admits of accessaries in treason as traitors, contrary to our Constitution! Now, if accessorial crimes are to be introduced upon common law principles, and there is no doctrine of that kind laid down, then we can have no accessorial treason here; where all crimes are to be punished according to the descriptions which are affixed to them by Congress, who have it solely in their power. It is a necessary consequence, that where they have the power, and do not think proper to exercise it on accessaries *in treason*, that this Court can have nothing to do with it. It certainly must appear extremely queer to the American people, that after a war had been quelled, persons should be taken up and convicted for an accessorial connection in that war, by assisting or advising in it, according to the principles of common law! Thus, according to common law principles, a treason might be charged at any time whatever—a

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any distant time. But, Sir, common law treason has been cut up by the roots by our Constitution; there is not one particle of it left and existing in our Courts. According to our Constitution, there is no difference between procurers before the fact, and aiders and abettors: the same principle is to be applied to accessaries before, and accessaries after the treasonable act. If, then, it be true, that according to the English law, accessaries in treason are mere creatures of the common law, how can such *creatures* exist in this country? If, according to the law of England, a person who procures treason to be committed, or who plots against his country, with a view to subvert the government; who advises, counsels, or procures others to arm, or fight a battle for the purpose of subverting the government—if this is treason, it is created by the common law in England; and so it continues to exist: but how can such common law exist in this country? If it be in existence in this country, it must be in our Constitution. What, in our acceptation is levying war? Levying war consists in such and such facts as designated by the authorities, say the gentlemen. If that be the case, how does our law of treason stand on its own footing? Why on the Constitution, (and that being the case, the gentlemen's arguments are not quite so strong as they may have been supposed) and the Constitution never was intended to introduce constructive treason, in any shape, so that a person absent should be considered as present: and much less, how can a man be supposed to commit a treason, after the war was levied and at an end; because there may be English authorities to that effect. We are not to construe our Constitution in such a way as to make a man present when he was absent; nay, it is forbidden by the Constitution; and therefore such a doctrine cannot exist in this country.

Again. As it respects the presence of the party. The indictment in this case, in a peculiar manner, appears to me to make it necessary that proof should be produced of the presence of the party accused; and that if no such testimony is produced, all proof respecting acts or intention elsewhere, is highly improper. Suppose that this indictment charged Col. Burr with being connected with an unlawful assembly, or a riot; if he were proved or acknowledged to be not present, would not the Court say that he was not guilty of the crime charged upon him? And shall proof of absence avail in the Court, where the charge is unlawful assembly or riot, and not avail in a charge for treason, where the *life* is at hazard? Would it not be strange that a doctrine existed respecting riot, or unlawful assemblage, where a *legal* presence was not admissible, and yet in the high crime of treason, it should be admitted!

Again. Every crime must be tried in the state and district where it was committed; and the accused be informed of the nature and cause of the accusation against him.—8 Amend. Con. U. S.—So, if there be any evidence brought against us respecting a crime which is not specified in this indictment, or at any other place than specified, we have a right to object to any such evidence. The act stated in this indictment is, that the accused, with a multitude of persons, did certain acts in the county of Wood. Now we want to restrict all evidence to that

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county; and say, that if there were any criminal acts committed elsewhere, evidence of those acts are inadmissible under this indictment: and no evidence is admissible, except it goes to prove, that at the spot specified, the accused personally, with a number of persons, did the act specified! That he must have *been there* with an assemblage of people, is the *sine qua non*; and indispensible with the charge of levying war, agreeably to the doctrine of the Supreme Court. If the people were there, and levied war, and *he* was not there, he could not be found guilty by this indictment; because the indictment limits the proof to the state of Virginia, and even to the island specified. We are, therefore, not obliged to answer to any other evidence. If the prisoner was linked and leagued with, or a contriver of the conspiracy, it ought to have been stated, that he might have known to what to answer. Certainly the indictment must carry the strong belief, that the prisoner was in Wood county, levying war in person; and no supposable connection ought to be received; if it may be, it must respect a principal in the second degree; in which case he may require the previous conviction of the principal. And again: If it was to be considered so, the indictment ought to have stated it. He has a right to refuse to go to trial, if he is to be considered as a secondary in crime, until the principal has first been tried. Therefore, Sir, if facts are offered to be proved, which does not relate to the indictment, the testimony is not admissible. I understand Foster and Hale very differently upon this subject, from what the attorney for the United States does. If a party has an indictment put into his hand specially stating the link between him and the principal, and he chooses to wave the privilege of the record of conviction, he may do it, but he must do it in form, which he may readily avail himself of: but, in this indictment, is Mr. Blannerhasset, or Mr. Tyler, named as principals in the first degree, to whom Col. Burr was linked? Their names and situations are not mentioned; and yet he is named as having been connected with certain persons unknown. These gentlemen are said to have been there, when it is clear Mr. Burr was not, And now, because he has gone into his trial, without any knowledge of the indictment, it is said to be a proper time to make objections to irrelevant testimony! It was said that there was such a thing as a special indictment. Now, if ever there was a case, when a special indictment was necessary, it must be on the present occasion, where the person is only considered as a principal in the second degree, which has no foundation *in foro seculi*. This having taken place in Wood county, all evidence relating to any other place or to any other time than stated, must be inadmissible. Testimony must be confined to the matter in question: because there are Courts in other places as well as here, where crimes committed elsewhere can be tried with equal ease. I must own that I am really at a loss to know how it was possible for gentlemen of the talents and understanding which we have seen exhibited, to pretend to say that the law gives them a right to introduce witnesses to prove an act that has not been set forth and specified in this indictment. It is not according to the rules of law; and, therefore, cannot be allowed.

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With respect to the fourth point, I would admit the gentlemen's arguments to be just, if they would apply the common law of England in treason to this case; but then they must give us the benefit of the common law too; upon which we must contend for the benefits we should derive from the accessorial nature of the charge; so that the accused could not be brought to answer until the record of conviction of the principal should be produced: and therefore, the common law would prove our innocence. For God's sake, let us not witness the establishment of a principle which would bring a man into danger, and which would deprive him of all these aids which would go to establish his safety. If you adopt such rules in your practice in this country, Sir, I would ask, where is the country which would be in a more deplorable condition? Common law doctrines are introduced to make a man a criminal, but the rules of common law are exploded when they may tend to acquit him! Now, leaving it to gentlemen who may be enquiring metaphysically into the subject, for the purpose of trying what are their physical powers, I would ask, upon what ground they stand with respect to the present indictment? If they mean to make the prisoner a principal in the first degree, the door to evidence is wide open to them: our principle does not repel any evidence which they may bring upon that ground. But, Sir, take it upon the ground in which we represent it, and I will ask, whether, in felony, a man who procures that act to be done, but takes no part in it, is not a principal in the second degree? If the prisoner never was at Blannerhasset's island, he must, at most, be a principal in the second degree—East, and 2 Hale, 623, are clear upon this doctrine, and the manner in which such a case is to be tried: the record of conviction of the principal is indispensably necessary, before an item of testimony can be received: this is the inevitable order of the evidence; and without that record, the case must stop.

And how is it to stop?—what authority is to end the enquiry? Undoubtedly it is the Court who must exercise that power. You, Sirs, have already determined in one instance during the present term, that it does belong to the Court to regulate the order of testimony. But it belongs not to the Court to decide contrary to law: their powers are designated. You are now to decide, that a record of the conviction must be produced, before a principal in the second degree, or an accessary can be put to trial: you are also to say, that it is incumbent on the prosecution to produce two witnesses to the overt act. If one may be dispensed with, so might the other. And will the Court part with what is their right, and what they are adequate to, on the present occasion? I am persuaded that they will not.

Upon a review of all the ground which we have taken upon the present occasion, I am obliged to flatter myself that our case is in such a state, as that, unless Col. Burr's presence is proved, (which is not pretended) it is absolutely necessary that your honours should exercise your power in regulating the testimony, and exclude such as may be offered, which is not relevant; both upon rules of law and right. I trust that the Court will be satisfied of the force of the argument and law which we have pro-

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duced; and will declare its opinion. I am satisfied, that if any one of the four positions which we have offered is correct, the present case will be readily disposed of.

Friday, August 28.

Mr. Martin. I shall now endeavour, may it please your honours, to put a close to this long, and very important argument, before the Court. I shall not, however, complain of the length of it, because of its importance; for upon the success of this motion, much of the happiness or misery of our country depends. On that account, I shall not make an apology as to the length of time which I may find it necessary to use; and particularly, as the decision upon this question may put an end to this trial.

We have contended that there is nothing to support the charge against the accused; and we have strongly supposed that there can be nothing brought against him to support it. We have, therefore, put the fate of the trial upon the relevancy of testimony, by saying that no testimony ought to be heard that does not relate to the matter before the Court. And for this we have been denounced, under the impression that we are about to take the case out of the hands of the Jury! It has been said to be their province; and that we wish them not to enjoy their indisputable rights! That will be a question which we shall discuss.

It is farther charged upon us, and held up to the Jury and to the public, as a conclusive proof of our guilt, that we would not interrupt the course of the testimony, if we knew ourselves to be innocent: but fearing the consequences, and knowing that we should be proved guilty, we endeavour to stifle every avenue to truth. And we have been told, that we have been acting upon the people in the science of defence, endeavouring, thereby, to save our client from punishment. Let me state a few facts: when you view the immensity of time which has been spent upon this prosecution, it becomes us to examine into its process. The Grand Jury were sworn on the 22d of May: and we waited here, patiently, from that day until the 18th of June, under every inconvenience, attending daily, for the arrival of the *primum mobile* Gen. Wilkinson, who was all-important to the trial. But he, though well apprized of the time of the sitting of the Court, failed to make his appearance; and we, all the while were forced to suffer all the inconveniences of imprisonment! No witness was sent to the Grand Jury until the 18th of June: and the first pannel of the Petit Jury was on the 3d of August. The Jury were not called to the book until the 10th of August, although on the part of the prosecutor, every thing was ready: yet, anxious as the prisoner was, he waved his constitutional privilege, and was prepared for his trial. But it was not until the 17th of August that a Jury was compleated, so that we could proceed to trial!

It may be said, that it was our fault, because we did not submit to the pannel, but required a tallis; but how can this blame be thrown upon us, when the reason for it evidently was, that we did not choose to accept of gentlemen on the pannel who had already signed the doom of the accused. The pannel was made up on the 17th, and this motion was made on the 22d, and yet, during this time there were but twelve witnesses examined, out of one hundred and forty! Independent of which, there would

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be thirty or more on Col. Burr's side. Then, Sir, according to comparison, not less than a month, or perhaps two months would be consumed in going through with the witnesses. Add to this, a consideration respecting the season of the year: is it not probable, that before this trial could be brought to a close, one of the Jury might get sick from the incessant confinement which they must endure? In which case the trial must either be gone over again, or it must be suspended. And, if the whole should be gone over again before another Jury, the same accident might occur again from the same cause. Thus, from a view of the infinity of witnesses, most of whom must be unnecessary, there is scarcely a probability that we shall ever get the trial ended. But, Sir, all the while Col. Burr must remain in confinement; and all the benefits which he could otherwise derive from his counsel, amidst their immense inconvenience, would be totally useless to him. And the same would have to be repeated at a future day.

These considerations ought to satisfy the Court that our motives are founded on correctness and justice, and not on any wish to evade justice. It certainly is my most earnest wish that the whole of the evidence should be gone through: I wish it for the sake of justice; and I am the more ready to meet it, because I am fully satisfied that the whole of it can prove nothing against Col. Burr; and that his innocence would appear as pure as the unsullied snow; although the malice and persecution of his enemies had placed Col. Burr in this situation, which to us all must be a matter of regret; yet, Sir, I feel the greatest gratitude to Heaven, that through the whole of my life I have been spared to vindicate innocence; and that I am now here to plead *his* defence who I consider to have done no harm to any one.

If myself, and the honourable gentlemen with me, should be so successful as to rescue a gentleman for whom I entertain the most earnest esteem and friendship: if we should be able to wipe away the tear of filial pity; and save youth, innocence, elegance, and merit from a life of unutterable misery, despair, and distraction—it will be to me a moment of the greatest pleasure that I ever enjoyed on earth; and will afford to me a source of bliss much to be esteemed.

But, Sir, I am not merely induced to extend my utmost efforts to save the accused from conviction, from the particular regard which I have for his person and connections: I am induced from a different motive: I am thankful to Heaven, that when such great questions are to be decided, as those which respect the principles of treason—questions on which the happiness or misery of the United States depend—questions which will render the United States, at some future period, either an *Eden*, or an *Acaldema*; I feel happy that I am able to lend my feeble voice, and afford my small talents in the elucidation of so important a subject. And if we shall succeed in establishing correct and proper principles on this subject, I shall felicitate myself with the impression, that I have not lived in vain.

Before I proceed into questions of law on this subject, I beg leave to make a few remarks to your honours on some observations which were made by the gentleman who spoke first, and

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one who succeeded him. They boasted that they never introduced any foreign matter into a debate by way of declamation. It is correct and proper; but then they charged it upon us: they say that they were compelled to go into it by our conduct. No less than three times did he lament the painful necessity he was under; and yet one half of his speech was composed of declamations that Col. Burr was guilty of the crime that was charged; and at the same time eulogizing Gen. Wilkinson: then they said that Col. Burr's counsel, instead of taking his part, had made attacks upon Gen. Wilkinson and Mr. Perkins. I object to these indirect and unfounded charges against us. If I understood, there were indirect charges that we had prevented some of their witnesses being here. If he did not mean any thing of the kind, why was the gentleman not candid enough to avoid taking up the time of the Court unnecessarily, and tell us that one of their witnesses got drunk, made use of improper expressions, and left the state without appearing at Richmond at all.* Sir, was it Col. Burr or his friends that made this man drunk; and that caused him to use expressions which tended to nothing less than riot and insurrection of the most dreadful and horrible kind that can be conceived? Was it them that instigated the dreadful means of putting a dagger into the hands of slaves to be used upon their masters? If no imputation was meant, why was such a circumstance mentioned? A most unfortunate circumstance, indeed, for the government, that among their witnesses, they were obliged to select out of society such infernal villains as that man appears to be.

Another charge against us was, that we had endeavoured to commit another of their witnesses.† Now would that have had any evil effect upon them? Would it have prevented them of the benefit of their witness, if we had succeeded? No, Sir, on the contrary, it would have put him in a safe place, where he could be brought to the Court at any time to give evidence against us. Why then were the public called upon to witness whether there could be one *doubt* of the guilt of the accused, when they had such poor ground to establish it? Did the evidence of General Eaton, of Commodore Truxton, or of the Morgans, authorize the gentleman to say that there was no doubt of his guilt? The law on this subject is stationary, upon which there can be no doubt; the decision will therefore depend upon the facts stated to the Court, and upon the law applied to them, without regard to any party whatever. Somehow or other however, the gentleman has deviated from this principle, and wandered into misapplications: he cannot, then, blame us in return for wandering after him, if we have done so.

It will now be proper to come to the four points into which this subject has branched out; they were, in substance these: Admitting the facts sworn to, to have been done on Blanner-

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* *This alludes to a witness, who, it was said, on his way to Richmond, had attempted to instigate an insurrection among the slaves, the truth of which never was ascertained.*

† *General Wilkinson.*

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hasset's Island ; and that they were all true, yet they did not amount to levying war in the persons who did those acts. 2ndly. No accessorial agent, in levying war, can be brought to answer, until the conviction of the principal actor shall be produced. 3rdly. That no evidence of accessorial agency in levying war can be received in supporting an indictment, when the accused is charged *generally* with levying war ; and when his special accessorial agency is omitted to be stated. 4thly. That the operation of the common law of England, which makes a person a principal in treason, cannot apply in the United States, nor be admitted here.

When I talk about an act of treason, I mean levying war : thus, in England, a person who was to enlist a soldier to promote an expedition, would be guilty of treason, but it would be in an accessorial way. Now the principal may be put to trial at the same time as the accessary, if the Court so direct ; but the Jury are directed not to find a verdict against the accessary if the principal shall be acquitted. Here I must beg it to be understood, that neither Col. Burr nor his counsel holds up, or suggests the opinion to the Court, or the public, that any individual on earth was guilty of treason on Blannerhasset's Island. Where then is the position of the gentleman who spoke last, that Col. Burr was willing to sacrifice Mr. Blannerhasset ? We hold up to view, and we earnestly believe it, that Mr. Blannerhasset is as innocent as I am, or as the gentleman himself is. We say that no one on the Island intended the least injury to any one ; and it is perfectly clear that they did no injury to any one. Col. Burr could therefore have nothing to fear ; and consequently could not even intend, or think of sacrificing the other gentleman. He knew that neither constructive presence, nor declaration of intention, could avail to promote a conviction of any one in the United States.

Having therefore cleared ourselves of the imputation of being willing to sacrifice others to clear ourselves ; and declared that no person whatever was guilty of treason in any part of that transaction, we will now come to the legal principle, even supposing treason to have been committed as respects this case.

The first step I shall take, will be to investigate, as well as I can, the characters of principals and accessaries in murder or felony, before and after the fact, and then apply the doctrine to the case of treason : where it is declared, that such persons as would be accessaries in murder or felony, are considered as principal accessorial agents in treason. An accessary in murder or felony is, every one who has any connection ; whether present at the commission of the crime or not ; if he can, by strict law, be considered as constructively present. Mr. Martin then to illustrate his position read 2 Hawk. 445 sect. 16 ch. 29 and ib. 448 sect. 26, ib. 439 ch. 29, sect. 1 ; and 1 Hale 233, 435, respecting accessaries before and after the fact. A distinction however had been attempted to be made relating to treason, between those persons who procure and counsel ; and those who, after the fact, procure or assist the escape of the traitor. I shall examine the correctness of the sentiment advanced ; and shall shew that whatever doubts used to exist on this subject, they

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have long ceased. The gentlemen have very correctly stated, that where a person is within hearing or sight of the action, and belongs to the party, he must be considered as a principal, and not an accessary: but they are in error when they want to transfer this legal presence to Col. Burr, who was one or two hundred miles off at the time when they charge the treason. The difference is evident.—1 Hale 439, Dalt. 341.—If several go to a house to kill a man, and one only goes into the house and performs the act, the law says they are all present; because they were all ready to give aid and assistance if it should be required. The next case is Lord Dacre's in the park: they had gone together into the park to kill deer; and made a previous contract, to resist, by violence, any opposition that should be made to them. It was an illegal act in the first place, and they all went together with one illegal design.—(Moore 86)—One of them was met, and opposed by the game-keeper, and the game-keeper was killed by him: the others were in other parts of the park, but it was declared to be the act of them all, because they had all gone there to commit felony; and because they were near enough to each other to encourage the act of murder, or to give immediate assistance to him who did it: for it appeared that the others were within call, not being more than a quarter of a mile off. So as to the case of the Burglars: some stand at the lane's end to watch and to give alarm in case of a discovery, and one of them goes to the house to steal. They stand so near that he can receive immediate assistance; and they all go to execute one object. Certainly then, they are all alike. Pudsey's case was referred to by the gentleman. This case is reported in 7 Anderson, 116. Pudsey and another went out to rob on the highway: they met two men whom they endeavoured to rob; to avoid being robbed, one ran one way, and the other another. Pudsey pursued one, but did not overtake him: his companion did, and robbed him, out of the sight or hearing of Pudsey. But it was judged that Pudsey was equally guilty, because they were both together when they met the men: and they had one determined object. It is enough, if a man is sufficiently near, as that he is known by the other, engaged in the same pursuit, to give him aid. Fost. 349, 350, was also commented upon; but I consider this as merely a general expression, founded upon the cases which are referred to, and not designed to extend any farther. It does not require a strictly immediate presence to make a man an eye, or an ear witness to an action: and no case that has been quoted can justify the strict necessity of it: but certainly there is a most material difference, between an eye or an ear witness, or one evidently entering into an expedition, and the situation of Col. Burr with respect to the transaction on the island. Was he keeping watch at, or near the island: or was *he* ready to assist or aid them? Was he near enough to give them knowledge, counsel or advice? Was he near enough to assist in committing an act of treason, or to prevent a surprize, in case they should be interrupted? Was he near enough to aid the escape of those that were immediately engaged in the act, be it what it might? Foster only intends to lay down positions to shew who may be considered as constructively present; and it cannot apply to our

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case. 353 was also alluded to; but Foster meant it only to illustrate a general principle. Three soldiers went together to rob an orchard: two of them were in the tree; the other was on the outside, with a sword to watch—the owner's son came up, and collared the soldier, who stabbed him. Now the judge's opinion was, that as the death was without the knowledge of the other two, they were only engaged in a trifling trespass: but it would not have been so if they had come with a determination to oppose whoever should interrupt them as in Dacre's case.—2 Hawk. 442, sect. 8, ch. 29.—It is enough that the person should be emboldened in the act by the hope of immediate assistance from others of the party.

But, Sir, in this case, the counsel have endeavoured to make a distinction between a person who levies war, and a person who commits murder or felony, as it respects immediate presence. That to determine the question of proximity in the latter, you must consider the great object which they all have in view; and therefore he brings in the supposed object to support the proximity, or legal presence of Col. Burr, although he was 200 miles from the spot; and yet he is considered as *legally* present.

Again. We are told that the overt act is not the treason, but that *treason* consists in the treasonable *intention*. Why, Sir, I can hardly admit that there is such a species of treason, even in Great Britain. But surely the gentlemen all know where treasonable intention is spoken of, it relates to a conspiracy, or compassing the king's death, the death of the queen, or the eldest son, who is heir to the crown. In this crime it is not even necessary that the act shall be done: it is enough for one to write a letter to another to advise the act to be done, although no attempt is made to execute it: the overt act, in such a kind of treason, is the intention proved to do the act. The writing of the letter, is not in itself treason; but that is admitted as a proof of the traitorous intention.

Now, Sir, let me apply this doctrine to our case. Enlisting of men, the gentlemen say is treason. It is treason in Great Britain; and why? Because it partakes of that species which consists in the traitorous intention; or what, in legal terms, is called compassing the king's death. But, I will shew that it is not treason in America; because here, no treason is known, but which is declared in our Constitution. What are we charged with? The act of levying war: this is the "overt act;" and that must be laid if we are to answer to it:—that act must have been committed, or otherwise we are clear. 10, 20 or 50 acts may be laid, but some one or other of them must be proved to have been *an act of levying war*, otherwise the proof of treasonable intention will be unavailing. The gentleman ought to know that no person can be punished as a traitor in this country, for a conspiracy to levy war; but that there must be an act proved. Now let them give evidence to this Court, that the accused has done any *overt act*, and that *that* act amounted to levying war, as laid in the indictment, and we cannot object to the progress of his testimony; but he cannot go out of the indictment for proof. Just so is the case which has been mentioned: there is no way of proving a person to be guilty of murder, except you first prove, that some one's life was taken from him. The *act* must

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be proved first, and then the intention with which that *act* was done, before it can be denominated a crime of any sort.

Again. Let us refer to the other part of the principle. They say that the treason consists in the treasonable intention. This has been repeatedly said. Now, I acknowledge that this is the doctrine in England respecting conspiring the king's death; but how it can be applied here I am really at a loss to know; because, here, levying war consists in the overt act; otherwise all other cases must be brought to the same standard; and intending to commit homicide, burglary, or felony, would be doing the act: which interpretation would shew its own absurdity: for that levying war which is meant in our Constitution, must have for its object, a design to subvert the government of the United States.

Mr. *Wirt* did not know to what part of any argument used, the gentleman's doctrine applied: for certainly no such thing had been advanced as that a treasonable intention was treason: the moral turpitude of the guilt to be sure must be in the intention; and so far our doctrine went; but this can only be discoverable by the acts which follow, since intention and action must combine to establish the guilt.

Mr. *Martin*. The gentleman cannot make it better, for their arguments will at least resolve into the same doctrine. The crime of treason must as much be confined to the spot, as a murder must be to the spot where it was committed: it is not to float all over the United States. 1 Hale 149, will shew that there may be levying war, with all its formality; and yet the act of treason may not be committed. It must be a meeting of persons, doing treasonable acts; and those acts must be of a nature in America, to endanger the existence of the government. And then, Sir, you must examine into the intention, to discover whether it is rebellion or an act of treason. So far from the proof being *in modo gerina*, you must prove that the intention was treasonable; and that its object was subversive of the government. I execrate any doctrine of a contrary tendency: and I shall have occasion to oppose the positions laid down in Pennsylvania; for I declare that none of the insurgents, in what was called the whisky insurrection, or in the hot water insurrection, were guilty of treason against the United States: and I do most solemnly think that the President's interference on those occasions, happily prevented blood being shed unjustly. And if even those decisions should come to be reviewed before the Supreme Court, I shall certainly make a few observations on the subject. I believe that neither of those circumstances did amount to more than a great riot; and that if persons had been killed, it would amount to murder, but not to treason: since the intention with which it was done, was not to subvert the government. Gentlemen have fixed a locality to this charge; and yet, under the idea of a treasonable design, which they say might accompany a man wherever he goes, it might operate with terrific steps, like the pestilence, mowing down its thousands wherever it goes, giving ubiquity to its operations; and giving to the person, who harbours it, all the omnipresence of the Deity, throughout the country against which it is entertained.

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In order to be understood the better in my future plan of argument, I shall examine a little into the different branches of treason in Great Britain; and shew how far decisions there can be applicable to treason under the American Constitution. I thank God that decisions in the English Courts, cannot, however respectable they are, be binding in America: and that most of them are considered here as obsolete. They were, most of them, established by iniquitous and bloody Judges, whose memory is abhorred. And even after the year 1688, so much of it was left in the Courts, as to shock humane Judges. In a certain degree, rules of evidence, and constructive principles of such a nature were left, that they felt the greatest difficulty to get clear from their shackles. It is not, however pretended, that the Judges, since the revolution, have evinced any warm wish to gratify the will of the crown, and carry the former principles to that extent which they could have done: but they were bound to a certain degree from it, or else the statute of William 3d would not have been enacted. I consider it requisite to go into an investigation of this matter, in order to understand it: because, there are many general expressions made respecting acts of treason, which would not be acts of *levying war* there—1 Hawk. ch. 17, sect. 3—"When a man doth compass or imagine the death of the king, queen, or their eldest son, and heir; or violate the king's companion, or the king's eldest daughter, unmarried; or the wife of the king's eldest son and heir; or levy war against the king in his realm," (4, Bl. 76) are different species of treason, amongst the rest in Great Britain, and require an overt act to be proved: the perpetration is to be attended with an "*open deed*, by men of his own condition"—(4 Bl. 79.) And this the indictment must contain; and the act must be laid—1 Hawk. P. C. 56, ch. 17.—In the first of these acts; that is, to compass or imagine the death of the king, queen, or eldest son, it is made treason whether the deed is done or not.—(3 Inst. 5.)—In the other cases, the act must be done. For instance, a person may *intend* to violate the queen, or any other of the family, and would no more be guilty of treason under the act of Parliament, than if he had *intended* to violate a lady of any other family, or had *intended* to commit any rape whatever.

So, Sir, the *intention* to levy war. A conspiracy formed, and means provided to levy war, even, would not amount to the *act* of levying war, because war is not levied. And I think I shall prove to my friend on the other side, that "levying war," and making war, are the same thing: and that no combining to levy war, or preparing means for it, can constitute the treason. I know that there was in Great Britain, a temporary act of Parliament passed, to turn a conspiracy into treason; but it was because that conspiracy constituted the treason. And so as to the regicides: the death was given in evidence to prove the charge. So an indictment on a conspiracy to levy war might have then specified the conspiracy, and the overt act might be given in evidence of it. Some doctrines to be sure, have been carefully laid down in our law-books by elementary writers, making a conspiracy to make war, in itself, a treasonable act: and in those cases, as in cases of compasing the king's death, any consultation

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to levy war would be proof of treason. The enlisting soldiers would be proof of the intention of the consultations, without war being levied at all. So with respect to aiding and assisting an enemy: nothing is openly done, but many things might secretly be done to give aid—such as writing a letter to give information; enlisting persons to assist them; or accepting of a commission under the banners of an enemy. None of them would be levying war against the king; but it would be a sanction of, and adherence to his enemies. Of the same nature would be transmitting arms, ammunition, provisions, or a letter of information.

I shall now trouble the Court with some proofs of what are overt acts of that species of treason which exists in the intention, without any treasonable act ever having been attempted, agreeably to the English precedents, in order to prove that they are not applicable in this case. (Here Mr. Martin went into a review of cases respecting the rebellion of 1745—he quoted 2 Ventris, 316; and Patrick Harding's case, &c.) He observed, that almost all the indictments in former periods, were drawn up, charging the person with compassing the king's death, even if it were that species of treason where the person aided the king's enemies; because it was imagined that the king's life was in danger. And hence it was, that such absurdities crept into some of the precedents: and they went beyond every kind of evidence—they procured evidence of any kind; letters written from one man to another; words used, and declarations made, not in the presence of the person accused, and of which he knew nothing; letters written, not to the accused, but directed to some other person unknown to him; and papers found in his possession—all were jumbled together in Courts of justice, as good evidence: they went to connect this testimony with each other in some way or other, and the declaration of the Judge completed the doom: the worst of Judges that ever sat on a bench of justice, connected the prisoner in some way or other, or some conspiracy or other: and this was called proof of his guilt. Though no act of the accused was ever proved, yet the declarations of any body in order to prove him connected with them in *imagining* the king's death: and all this confession made to save that person from the scaffold. Thus, Sir, the declaration, whether the act was ever carried into execution or not, which he could never possibly disprove, was received as evidence of his guilt. Indeed the death of the king would have been an act of notoriety, and the proof of the act might have been made out regularly.

And this, Sir, is the system, and kind of testimony which the gentlemen have endeavoured to introduce in the present case. They have, from the first to the last, done so with respect to this prisoner; and have charged him with acts of agency, which they have not proved. They certainly are bound to prove that there was a connection between him and the persons who may have been guilty of the conspiracy. In an act of levying war, you must prove the act done, and then prove the intention of the act. The same sort of proof will do in this, as in every case; but you must not produce the acts of accomplices, but the chief, and particularly declarations made by them. When several are engaged in a robbery, it never was known that declarations

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tions made by others were admitted in evidence, against the person charged, unless he were present, aiding, assisting, and approving of those declarations.

Again. Although under the statute of Edward 3d, two witnesses were required to the overt act, (and it is not to be doubted but it was meant to apply the evidence of these two witnesses to the overt act laid,) yet, many of the Judges, in order the better to execute the will of the crown, and destroy whosoever the crown wished to destroy, ruled it—that if one overt act were proved where it was laid, by one witness, and another was proved elsewhere by another witness, the person was declared to be guilty of treason under the statute! But all these wicked determinations were in cases of compassing the king's death. Now, the prosecution, in the present case, remarks upon this subject—suppose that an overt act being proved in one county, they may go on to prove other acts in another county. But let them observe what the law says upon this subject; because the Judges have so frittered away evidence as to make any thing treason; as that two witnesses might prove two treasons in two different places; and thus make an overt act of treason of a nature that we cannot have in this country: they have supposed that different overt acts, in different counties, might be brought together to compose the treason. But, according to their own doctrine, it ought to be determined, that there was one overt act committed, before they may say that the treason was committed. I must acknowledge, Sir, that the establishment of such a principle as they contend for, would evince a display of vengeance, not inferior to that displayed by those monarchs whose reigns we denounce. All this was inconsistent with common reason, common sense, and common humanity; to render a law, which, in itself was good, subservient to the purposes of bad men. Whoever will read the statutes of Edward 3, and the statutes 5 and 6 of Edward 6, and with them compare the decisions of the wicked and arbitrary Judges referred to, will find that the force of these statutes was destroyed by them; and with it, the security of the subject. For by them, no person was to suffer for treason, who had not done it in the most open and public manner, and which could be evidently authenticated.

Why, Sir, in addition to this, it will be found, that in a short time, those corrupt Judges determined that a person might be convicted of treason, (not only by the evidence of two witnesses, delivered in this way,) but upon confession out of Court, or wheresoever, without evidence of the overt act in any other way. Thus, whenever it was thought proper to destroy any persons, perjury might take the life of any man, without danger of the perjury being discovered to be such. Such being the danger to the life of a man, it was ruled that no confession, *out of Court*, should be received; since it was impossible for the person charged, to disprove the oath of those who sought his destruction.

I shall now call the attention of the Court to the nature of testimony requisite to support the charge. It is necessary that, at least, the evidence should be of the same nature as that proving a rape, a felony, murder, or any other crime. I repeat here, that it must be proved, that the act was done; and done for the

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purpose charged in the indictment. Neither of these charges, nor can levying war (even against the king of Great Britain) consist in *intention* of the mind. When war was never levied, (in Great Britain) it must be proved, that all the acts which were done towards the charge made in the indictment, were done with a view to kill the king. In the United States, it must be proved to be with a view to subvert the government, and to establish some other sort of government in its place. I believe that the gentlemen will acknowledge this—and however many people there may be collected together, and however they may fight and kill each other, still it is not a levying war against the United States; unless their view be, to subvert the government in its present form. If the treasonable idea, or that of levying war, can consist in any thing else, I should be glad to know it. I contend that we can have no person at the helm of our government, in its present form, whose life being even taken, would be considered as levying war, or as treason in any shape. If they were to conspire to raise an army, and to kill any of the officers of the United States, it will not be levying war, however great might be the damage done: it could be no more than a great riot. I have already stated, that there must be an overt act in *every treason*; and I will shew that that overt act must be laid to be for the identical purpose of levying war, and specifically to that crime he is to direct the evidence. 1 East, 116—"The particular nature of the treason must be charged in the indictment; and then some overt act must be laid, as the means used to effect the traitorous purpose." Then, Sir, the overt act comprehends the thing done; and this thing done, must be by the principal person who constituted the treasonable act, by which he will be prepared for his defence. 1 Hale, 121, supports this humane doctrine; and he shews his disapprobation of constructive treason, or that which is not specified in the indictment. The overt act is an especial and necessary part of the indictment: and as it must be laid, so must it be proved; otherwise both are in vain. 2 Hawk. ch. 46, sec. 34; and, upon the same point, Keyling 15. These and others hold up the doctrine, after saying that it may be transitory, and evidence may be given in any county, if it is for compassing the king's death, say, "if the indictment be for levying war, then, in that case, it must be in the county where, in truth, it was committed.—1 East, 125, 126; M'Nally, 504, 505, rule four and five; 2 Hawk. P. C. ca 46. It has been suggested that in Deacon and Wedderburn's cases it was not so: but a reference to the cases will be sufficient to convince your honours of the contrary. "The levying of war can, in no case, be given in evidence as an overt act in any county in which it is not laid, unless it tend to prove some overt act which is expressly laid."—19 Geo. 2, and 20 Geo. 2; 9 St. Tr. 558; Fost. 9; St. Tr. 580; Fost. 22. It will be seen that these decisions do not, in the least, affect the general principle, that the act of treason must be proved in the county where it is laid. I understand the doctrine to be, that if they fail finding the facts in one county, they may go into another to prove them. A rebellious army had gone into Cumberland from Manchester; they took possession of Carlisle and held it, until they were forced to leave it. Deacon was one

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who was found there: the indictment charged him with levying war: it was expressly laid to be for marching into and taking possession of Carlisle, in opposition to the king's authority. There was no doubt of his being there, but there was a doubt as to his criminal intention. To prove this, they shewed that he was in Manchester with the rebel army, and while there, that he compelled a printer to publish a manifesto in favour of the Pretender. This was permitted to be given in evidence, but for no other purpose but to shew the *quo animo* of the overt act; and nothing could more strongly prove it. But it may be said, that this *quo animo* was not an act of war. I admit it; but there was a particular statute which said that any person who should take part with the Pretender to a certain degree, should be adjudged guilty of an overt act; and it was determined to be received in evidence on that very account. Here then was no act of levying war given from another county; but it was only given to shew that he was there with the rebel army, for the same purpose as the army itself was there.

Sir J. Wedderburn's case, Fost. 22, was laid at Aberdeen. He was officer of excise and collector under the Pretender; and he was found at Aberdeen, a place taken by the rebels. The taking of an office under the Pretender was, in itself, an act of levying war, made so under a particular statute: besides, it was aiding the king's enemies; and so was treason.—M'Nally, 507.

I will trouble your honours with an authority from 5 St. Tr. 17, 38; Vaughan's case, A. D. 1696; 8 Will. 3.—This is a case precisely in point upon all the principles that we shall contend for, to shew what is to be proved in cases of levying war, or in treason of adhering to the king's enemies. He was indicted for both crimes; (he read the indictment, and expatiated much at length on the charge and decision,)—2 Hawk. P. C. ca. 46, 5; M'Nally, 507—"where a man is indicted for high treason in adhering to the king's enemies; and certain acts of hostility done by him in a certain ship called the *Clencarty*, are laid as the overt acts of such adherence, no evidence can be given of any other distinct act of adherence, having no relation to, nor any way tending to prove, what was done in the *Clencarty*, though it conduces to prove the same species of treason; and, therefore, that on such an indictment, no evidence can be given of the prisoner's having run away to the enemy in a custom house boat, &c. Here Mr. Martin read Fost. 245, 246, and observed, that Justice Foster's opinion was, that as Vaughan was not charged in the indictment with escaping to the enemy in the custom house boat, how could he be called upon to answer for that act which was not laid. So here, said he, how can we be called upon to answer what is not in the indictment; or to answer to any thing which is not proved in the county itself? Are we to run to Beaver, to Cumberland, or other places not mentioned? Chief Justice Foster goes on to reason upon the subject; and his ideas are founded upon principles of natural justice.

How different is this from the gentleman's on the other side, who has so repeatedly expressed his aversion to common law, that he wishes all the rubbish of it to be thrown away; and to build his doctrine on "common sense." If he means his own

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common sense, I am sure it would be as unintelligible to my senses as common law is to him. It has been expressly decided in the case of Vaughan, that our positions are founded upon principles of justice: as also in the case of Demarree and Purchase: but there was no overt act laid there.

Chief Justice. The argument then used was, as I understood it, that an overt act might be laid in general terms: that is, that the person assembled at a certain place with a multitude of persons for a certain purpose.

A conversation here ensued on the subject of general and special indictments, in which Lord Balmerino's case was mentioned.

Mr. *Martin.* In the case of Lord B. the overt act charged is, that he took the city of Carlisle, and *held* it against the king. Lord B. said it was not properly stated in the indictment, because he was not there on the day stated. But it was alledged that he was not merely charged with the capture of the city, but for *holding* it. The overt act then was completely proved as laid. If there was any thing said about general terms, it must have been answered, that he *did the act*, and that was enough: for if he held the city against the king, he certainly did enter it, and therefore the day was not thought material. However, it is admitted that some overt act was necessary. I do not know that I shall go on to shew the Court that common reason and common sense will avow the necessity of military array in such a case. If the overt act is laid specifically in this case, the indictment will not only say that there was an assembly at Blannerhasset's island, but that they did take certain boats or canoes with them down the river, with a view of taking New-Orleans!

Here Mr. Martin referred to the cases of Bentwood, and Damarree and Purchase, 8 St. Tr. 218—to shew that there must be the overt act of war specified in the indictment, or else, that the charge was for compassing the king's death. What was the charge in the latter case? It was for pulling down conventicles or meeting houses.

Chief Justice. I understand the indictment to have specified the charge levying war.

Mr. *Martin.* I will only trouble the Court on this with one single remark: that whatever the precedents of Great Britain may have charged or omitted, this specification can have no effect upon us, since our Constitution has declared that an indictment shall contain (in such cases) the *overt act of levying war.* It having been admitted then, that there must be an overt act laid, and that the evidence must conform to that overt act; that it must be proved in the county where it is laid; and that no other acts of levying war can be given in evidence, even to strengthen the belief of the overt act, as laid in the indictment; I shall have reference to the indictment, to see what is charged in it. And first—I find one count, that it charges an assemblage of men met on Blannerhasset's island for treasonable purposes. Now, if I understand the gentleman, this assemblage of men was called levying war.

Mr. *Hay.* I said it was the *overt act* of levying war.

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Mr. *Martin.* Then I understand it to be the overt act of levying war, by an assemblage of armed men at Blannerhasset's island; and that the proving of that assemblage is the proof that war was levied. The treason here charged is levying war, and the overt act must consist in the armed assemblage met there. Now, will the gentleman say, or can he pretend to prove, that the purpose of those men was to levy war *there?* Any future thing to be done elsewhere, could not be, in itself, a levying war at that place and at that time. They only THINK then, that this number of men being assembled there, with a design to subvert the government, had formed the purpose of levying war in New Orleans! I ask, then, how Colonel Burr, who was two hundred miles from them, could be considered as constructively present? If he had been constructively present, he must have been near the spot, and have been able to assist them when necessary: Or otherwise he must have been watching in the neighbourhood to give them notice. Otherwise we have destroyed the ubiquity of the crime, no evidence of any such act having been proven.

Then, Sir, I consider that they are reduced to this specific situation: Was Col. Burr present there? Was he near enough to give information to others on any occasion? Were the men who were said to be of his party near enough to him to disperse at his call? But, it is said that Mr. Burr might have given them notice where he was, (one hundred or two hundred miles off.) How can this be compatible with reason; and particularly when he knew not that any such persons were there? Sir, the idea of constructive presence cannot escape your correct understanding, because it is perfectly irreconcileable with every principle of justice.

But, if the gentleman's principle is right, I must repeat the argument urged by Mr. Wickham, notwithstanding they have endeavoured to throw ridicule and contempt upon an argument which they could not meet by answering. It would have saved the prosecutors during the rebellion of forty-five, a great deal of trouble, if they could have brought the acts in Carlisle to have answered at trials in Perth, or those at Perth or Carlisle to have been good in Aberdeen: because the persons could have been constructively present any where, where the least connection is proved! By the rule of constructive presence, the man who levied war in Aberdeen, might have been charged in Carlisle, because he was one of the *traitors:* proving that, you prove all, according to this doctrine. This doctrine is admirable for its ingenuity, because the British lawyers never thought of such a subterfuge and depth of understanding as that exhibited here. For if construction could have made Col. Burr present, when he was one hundred and fifty miles from the place, how much more so could those at Perth have been charged with being at Carlisle! I think, Sir, this argument will put an end to constructive presence; for I know of no such thing in law.

I shall now, Sir, proceed to examine what will be the situation of the accused, if there be no such thing as constructive presence; and when it is left upon the situation of an accessorial agency: for if there be no constructive presence, and the person

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was not present, he can be at best only an accessorial agent in law or equity. In the examination of this, I shall satisfy the Court that there is no difference in England on a question of treason, between those whose accessorial guilt is before the commission of the treason, or subsequent to it. I shall make these few remarks, because it may tend strongly to prove that those who are only accessorily guilty must be indicted specially. By accessorial treason, or agency before the commission of the fact, I mean those who procure, command, advise or direct the execution of the matter charged. By a subsequent agency, I mean those who comfort, conceal, or endeavour to prevent from justice those who have committed the act of treason. Between accessaries before and after the fact, in cases of murder, felony, &c. there is no distinction. In point of law, those who receive and those who direct the act stand in the same precise point of view; because each makes the act his own, and is equally guilty: But neither of them can be considered to have *done* the act, however he may have advised, assisted or procured, and thus involved himself in the transaction.

Let me here, Sir, upon the gentleman's principle of common sense and reason, make a few remarks upon his position, that if colonel Burr did advise the act, he is equally liable. The extent of the argument is this: that if the person did advise, he must be *more guilty* than he who undertook to execute it; because he might never have executed, and not executing it, *he* must be harmless. In *foro cæli* to be sure he is as guilty as the person who does the act. In murder, an adviser is, in *foro cæli* equally guilty with the man who kills another; but if you transform this doctrine, *in foro seculi*, the man who advised it might be executed, whilst the man who did the act of murder might escape. Thus, upon the principle of common sense, you would strike out, from the list of criminals, those who do the crime, and transfer the whole guilt to the adviser. But, Sir, upon that principle, there would not be, as to felonies, any accessaries, because they would all be turned into principals, and contrary to all our former rules, would be indicted accordingly. Upon this subject, I would refer your honours to Chief Justice Foster, 361; a passage which was not merely founded on common reason, but, upon the perfection of reason. For whatever they may be considered in common reason, in common sense, or in *foro cæli*, yet in law there is no essential difference.

I now come to pursue the idea which I have before suggested: that those who were accessorially guilty of treason before it is committed; and those who assist after the crime, are equally guilty, and stand upon the same footing. I shall observe, that 2 Hawk. ch 29, sec. 3, will shew that it was a considerable time before this distinction ceased. The gentleman quoted Dyer, 296, but this was simply a case where persons harboured those who were guilty of coining money; and they were indicted for misprison of treason. He also referred to 12 Co. 81, 82, 3 Inst. 130 and Standford P. C. 3, but none of them refer at all to, or treat upon the general question of treason, but upon particular acts, with which we have nothing to do.

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Having, then, thus established the principle, that upon the law and practice of Great Britain, there was no distinction; and that there was no case of treason charged upon any who commanded, advised, and procured the act to be done, differently from those who comforted and assisted the escape of traitors, let me examine now how this indictment ought (as it comes out in evidence against Col. Burr) to have been drawn? Sir, we say that it ought to be charged against him accessorially, according to the *truth* of the case. If I understand the gentlemen, they can find no case but what refers to receivers or comforters after the treason is committed: but if I understand the British precedents, the indictment must shew the persons with whom they did commit the treason, or that the treason was committed. The precedents are so.

Throckmorton's indictment, 1 St. Tr. 184, states his crime in a particular and specific manner: 131 ibid. Abingdon was stated to have received, &c. Lady Lisle was indicted specially for having harboured and concealed Hicks.—Anderson 109, which was turned to on a former occasion, states, that, upon deliberation, the indictments were formed according to the truth of the case. Somerville set out to kill the king; and for that purpose, took with him powder and ball: he did this by the advice of two persons: it was some difficulty to know how this indictment was to charge, but it was declared to be necessary to charge specially, for otherwise how is a prisoner to know to what to answer, for he is not to come prepared to answer to all the acts of his life. It must be laid according to the truth of the fact. And those who procured him so to do were charged upon the act of their procurement. Tremanie's placita 3, Mary Speake's indictment was for conveying cart loads of provisions to the duke of Monmouth: it was drawn up actually according to the truth of the case; and the prisoner charged with aiding the rebels to carry on treason. She certainly was as much of a principal actor in carrying on that war, as it is stated Col. Burr could have been in this: and yet she was not indicted for levying that war; but it was stated that other persons levied the war, and she aided and assisted them.

Then, Sir, why does not the prosecutor, in this case, plainly tell the Court and Jury, in their indictment, that the persons levied war; and then state that Col. Burr did aid, procure, or assist in the same. How can they otherwise support the indictment? The plain truth of the fact is to be set *forth* according to its nature, and in such a manner as that the person shall be specifically informed to what facts he is to defend himself. The gentleman who first opened the case shewed, that where the indictment was for compassing the king's death, it was necessary for the indictment to specify identically what particular acts were done, and what the prisoner had done, in order to show him what to answer to: and to shew what part one took, and what part another took, in the same manner as was done in Somerville's case. Cornis's case, 4 St. Tr. 132, is also laid distinctly and particularly. He had done no more than to promise to aid and assist those traitors; but he is indicted as a traitor for it.—A. D. 1615, M'Nally 366, "He was indicted for compassing the king's death.

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The overt act was, conspiring with Lord Russel, and the duke of Monmouth to levy war;" and that he promised that he would aid and assist them in so doing. This was particularly laid, in order that he should know against what charges he should come prepared to defend himself. There is another case in Staniford 2, that goes to prove that when a person is charged, he is to be charged according to the nature of the crime. This is in the case of an appeal; and I presume that is the same as though it was an indictment.

I have referred to several cases of accessorial treason after fact: why have we not so many cases of those who advised the fact? say the gentlemen? I answer, Sir, that it is because almost all indictments in England are for compassing the king's death: and in that case, the person who advised it, is considered as much a principal, as he who put the king to death. Thus, if two or three meet to consult on the subject, the overt act is laid for consulting the death of the king, or advising it; and the party who does the act, (if it be done) is charged as doing it. But, Sir, it is never called levying war. Enlisting troops is charged the same: it is conspiring to kill the king: but it must be specified in the indictment.

Let me see whether it does not as much apply to advisers and procurers, as to receivers after the fact. Why as respects the death of the king, each is a principal. Every distinct act involves the person in the same guilt of the original act, as though he were the actual perpetrator: and so it is laid in the indictment. If, agreeably to the principles and rules laid down, the one who counsels and advises to the act must be called in construction of law, a principal actor; and he who receives or harbours in construction of law, must also be called a principal; is there any one reason in the world, why the one should not be indicted specially as well as the other?

But there is another reason stated in Foster, Hale and Hawkins, which is, that in all other cases, except compassing the king's death, persons who are indicted for treason accessorially, are to be considered in the same situation as those who are indicted for accessorial felony or murder, so far as relates to bringing them to their trial. And therefore, if the principal cannot be brought to trial before, at least, the principal is brought to the bar, with the accessary. Then, Sir, must it not be indispensable for the indictment to show (as all the authorities teach us) who did the act, and who it was that was accessorially charged? If it is not specified, it entitles the accused to refuse being tried, until the principal shall have first been tried, either before him or with him. For how does he know how else to meet a charge for levying war, when he knew himself to be hundreds of miles distant? The indictment must specify which of the persons levied war, and which assisted to levy the war; because, if the man who levied the war should be acquitted, the other must be of course, and no enquiry can be made respecting him. How else could he object to being tried before the principal was convicted, (if they were not tried together) unless the indictment preferred against him, of which he is to have previous knowledge, unless his situation in the transaction is specifically pointed out? It is

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upon this that the party can know how to prepare his answer, and produce his testimony, and upon this only. If the indictment be not specifically minute, how could he be prepared, he being 200 miles from the spot at the time charged, to meet the charge of a crime which he had not committed?

The gentlemen say that we want to be told what we know ourselves. This is begging the question; and it goes upon the presumption that every person charged is guilty of the crime attributed to him: whereas, the law supposes that every man is innocent, until he is found guilty: it supposes that he knows nothing of the charge, but what he sees in the indictment: the law does not require a man to look into his own heart, in order to see whatever he has been guilty of, or might be charged with through his life, and prepare himself for every thing and more too.

But, says the gentleman, he has summoned 30 or 40 witnesses, and he must have known for what purposes they were summoned to answer. Why, Sir, truly we did see that we were charged with a crime alledged to have been committed at Blannerhasset's island; and we summoned witnesses to prove that we were not there; and that we were far from that spot. And, we summoned witnesses to counteract the evidence; and indeed *to shew the true character of that good man who endeavoured to stir up the energies of the country to frustrate* TREASON! And we also brought witnesses to shew the character of some others whom the United States introduced, and may introduce. How, Sir, are we to know what we have to meet? What are we to *conceive?* Could we conceive all these things? The authorities say truly, that the indictment is to be given to us, in order that we may *know*, a certain number of days before, what we are to meet. If the indictment specified one crime, for which we were prepared; and when we had to come to trial, we were to meet another charge, would not this be a mere mockery of justice, and an unnecessary delay? But the gentleman has said, that indictments have been supported where there has been a greater variance than is here: they have stated that there may be half a dozen persons indicted in the same indictment for the murder of a man; and that it may be stated that A. gave the blow, and that B. C. and D. were present, abetting; and yet, that if it turns out that B. gave the blow, it would be a good indictment, because the others were abetters. But, Sir, this case is not analogous; these persons were together *on the spot*, and *did kill the man*. It was enough that he came there to answer for the charge, the man having been murdered by him and the others together. If he was prepared to give evidence that he was not there at the time; or that the man was not killed, it would avail; but he being present, it could be of no avail to say that he did not strike the blow; for the crime he stood charged with, would be, that he, with others, did murder the man.

I have stated another case: 9 Co. 119, and will read Foster 361; but I doubt the authorities; and I find that Lord Hale does not approve of them, because he supposes that, until all those to whom a man was said to be an accessary had been tried, or outlawed, he could not be tried. The case above stated in Coke

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was where the Judges were called together to gratify the resentment of the monarch. The case might have been right, but certainly for a monarch to make himself a party against a criminal, could not be right, nor leave them upon equal grounds: because instead of justice taking its own course, it was extra-judicial, through the interference of the sovereign. The opinion here, is worth the whole of the case: it is this: "for an indictment ought to come as near as possible to the case." And for this reason: because, in the indictment of a man, where his life is concerned, it ought to be set forth as clear as it is possible for it to be, in order that he might know specifically what is the charge against him, and how he is to defend himself against it. The principal was outlawed: the accessary was tried, convicted, and executed in this case. Lord *Sachar's* case, 10 Jac. 1 *Trinity*—The principal was afterwards tried and acquitted. This, saith *Coke*, reverseth the attainder of the accessary.—Fost. 367. This case however, is not analogous.

But the gentleman has stated the case before us—and, by the bye, if he is right in his opinion, I presume it will be of no great consequence to him, agreeably to what he has expressed: he has said, that an indictment in treason ought not strictly to be confined to times, and places: that *a day* is not material, because it is enough to prove that the party has committed the offence, and that, before finding the indictment, they give notice to the party what offence they mean to prove; that it was the offence of levying war on Blannerhasset's island; and therefore we must be prepared to prove that the intention of the meeting on Blannerhasset's island was not an act of levying war! But the gentleman further said, that the *place* was not very material. But, Sir, certainly the crime must be charged in some county. I acknowledge that it is not necessary to charge the very spot, but you cannot go out of the county. But says the gentleman, although we have charged the crime on Blannerhasset's island, we have a right to go into the whole county to prove the levying war. But admitting this to be the case, (which I do not admit) it is just the same. Now, I think that the gentleman would find himself wrong in the whole; but if he looks into the law, he will find himself bound down to his indictment on Blannerhasset's island; and he would not be permitted to give evidence out of it: he is not permitted to take the county to himself.—2 Hawk. ch. 46, sect. 34: "when a certain place is laid in the indictment, the least variance is fatal;" you may say the fact was done in a certain parish in Great Britain, because a parish was a *venue* in such a country; but here we have no parishes, and nothing but counties. But if you go to particularize and describe a spot where the offence was done, and there is no such spot, or no such crime was done there, you fail in your indictment. So, if a certain house is described, it must be proved to have been done in that house, or you fail. Now Blannerhasset's island is not a place for a *venue*, for the only *venue* that can be laid, under the laws of the United States, is a county where the crime was committed; and a part of the Jury must be taken from that county. The gentleman who prosecuted, although he was not obliged to give this strict locality, has charged the crime in the in-

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dictment to have been committed on Blannerhasset's island; and he is confined to prove it where it is laid. 2 Salk. 661,—If a person will give locality to a circumstance, he is bound by it. The same doctrine is laid down in Gilbert's law of evidence. He must prove it, although he need not have laid it so. The same in Fielding's penal law, 317. Judge Iredel also in Fries's trial, 171, was a similar case: he restricted the proof of the overt act by two witnesses at the town of Bethleham, where it was laid: and their evidence of the design was taken from the county of Northampton at large. The gentlemen, therefore, are not very correct in their position: for they are not permitted to range at large through the county of Wood. We are not to be led into these uncertainties when charged with the act of levying war. It is saying to us, "your did not commit the act there perhaps; and though you were not there, yet you advised and assisted them, at some time or other of your life; and, therefore, we must charge you!"

But, the gentleman says, that the indictment does not say that he was at Blannerhasset's island. But what does it say, Sir? It says that Aaron Burr, with others, did levy war on Blannerhasset's island. Now is not this the same? Would not any man suppose, that he was either there in person, or so near as to have assisted those who were there? But still, the gentleman supposed, he could indict him as though he was present, though he actually was not. He cited Hale 214, 238, and East 127. Why *Hale* says, that first there must be an *actual counterfeiting* proved. He has not said, that those persons were not actually present at the time of the counterfeiting: it is not quite so clear as the gentleman thinks it. In coining, there may be several persons engaged, when only one does the act: they have entered into the plan, advised it, and perhaps, are present: this certainly unites them in the same species of guilt. In another place: two persons are indicted for writing a letter, with a view to cheat and defraud a person. One only wrote the letter; but it was adjudged, that, the other being present, and having been concerned in it, might be indicted. In these cases, he says, that all are equally guilty: but he does not take it up as a principle, if the person is absent: it is only an inference, and the reasoning of the law will not support it.

With respect to 238, in compassing the king's death, the party who advised, commanded it, or had to do with it originally, certainly was supposed to commit the treason, and was a principal in treason. I am sure that *East* meant nothing else, because he quotes the case in Conyer, and that goes to establish nothing at all that can bear upon this. If you turn from the gentleman's quotation (1 East, 127) to pages 100, and 101, sect. 39; there, Sir, you will find that he can explain himself. Approbation, excitement, or advising the king's death, was almost universally the kind of indictments for treason in England; and in these cases, no doubt but the advisers might be tried before the persons who did the act; or who designed to do it, whether it was done or not. You will find, Sir, that in all other cases than compassing the king's death, they are considered in an accessorial point of view, and are not to be brought to trial before the prin-

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cipal, but by self-consent. As it is with persons who advised the act before, so it is with those who comforted after, in cases of compassing the king's death: they (like Aaron's rod) swallowed up all other cases of treason. 2 Hale, 223.—Here, to be sure, they are all principals; but he does not say that they are to be proceeded against in any other way than as accessorial principals or agents.

But, the gentleman says, that they could not, agreeably to our Constitution, lay the charge otherwise than they have done: that they must have charged him with levying war. But, I will say, Sir, that agreeably to our Constitution, however bad a man might be, he is not to be considered as guilty of treason, without he has committed the *overt act*. As to the gentleman's inability to charge Col. Burr otherwise than he has done, we shall see by and by. But if the charge was to be for levying war, why could they not state in the indictment that A B and C did levy the war, and then say that Col. Burr did counsel and advise them to levy that war: then let the levying the war be the overt act? if he had done what they say he has done; if they had made the indictment special, in a legal construction; and if that which was done was levying war; thus, they would be able to shew what parts the other persons took, and what part col. Burr took: agreeably to the doctrine that what he did, would constitute him a principal in the treason.

There was one authority which was alluded to; as to cases of tresspass: that the party who advised the tresspass, must be indicted as committing it.—2 Hawk. 440, ch. 29, sect. 3. The gentleman who opened this case, proved, that a person who would be considered as an accessary in felony, would not be considered so in tresspass; and could not be involved, unless he was guilty of assault, or some personal injury committed by him. But the authority does not say nor insinuate, that those who have set on foot or abetted a treason, can be punished before the person who *committed* it shall be tried. But, however the doctrine of tresspass may be, it is of but little consequence which comes first, or which last to trial, to a case where life is at stake: that should be considered as materially different from a case like treason, where strict and particular rules should be attended to; and where the principal actor should be tried before the accessary. Leech, in his notes, has explained this matter.

I have taken the pains to examine every authority taken from Bacon; and I should have liked to have had time to go through every case; and expatiate on Vaughan's, Cook's, and others; but I find that even in cases of tresspass, the person who performed the act must be convicted, before he who assisted can be called to answer to his charge. 1 Lev. 124, was also noticed, to shew that we were too late in our application upon the rule to produce the conviction of the principal first. This was a case where a master had procured his two servants to beat a man: he was indicted, but refused to be tried until the principals (those who beat the man) should be first convicted. But in this, and in Bogo's case, the indictment was not special; and prove, beyond doubt, that an indictment ought to state the facts according to the truth of the case.

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Having made these few observations as to the nature of the evidence which can *only* tend to conviction, and which must be specially laid, and to shew how far accessaries are to be considered as principals, I shall now proceed upon the nature of the evidence necessary to the conviction of Col. Burr upon the present occasion. I wish it not to be considered that we give up the principle of the necessity of the conviction of the principal being produced, before an accessary in any degree shall be brought to trial; and a proof that the act of treason was committed. We call for that proof on the present occasion that some persons did commit the treason; but we say, and we believe, that no treason was committed by any person whatever: but if any person did commit treason there, he ought to be convicted before Col. Burr can, in any way be made answerable. And this is agreeable to the universal principles of law on the doctrine of treason.

As the accused can, at most, be charged as an accesorial agent, we now proceed to demand a copy of the record of any person who was on the spot, to whom he was an accessary. They say that there is a case where it is not necessary to produce the record. I grant it: because if the principal and the agent are indicted in the same indictment, they may be put on their trial together; but even then, the accessorial agent cannot be brought to trial, until the principal is produced. Few, however, are the cases of this nature; and of such as are, the one is indicted as the principal actor, and the other as affording his assistance in the crime. The parties come there under a fair and full knowledge of what is to be preferred against them. The Jury, in that case, is charged to decide, first, whether the person who is charged as principal is guilty; and if they do not find him guilty, they are to make no enquiry as to the guilt of the accessary: of course he is discharged.

But the gentleman has found out another thing: he has acknowledged that the accessorial agent cannot be obliged to go to his trial till the principal agent is brought to *his* trial, or is condemned: he therefore said that Mr. Burr might not have been brought to trial until some one on Blannerhasset's island was brought to trial, or convicted. I suppose, then, the gentleman would express his humane tenderness for Mr. Blannerhasset: but where is his tenderness for my client? Sir, we do not say that we are to wait for the conviction of Mr. Blannerhasset; we do not think he ever will be convicted.

But here gentlemen say, "Why had you not come forward sooner with your plea." Why, Sir, I admit that if he had been charged with accessorial agency, it would have been our duty to have come forward at the first appearance of the indictment; otherwise we should have been precluded from the benefit of our plea, in any future part of the trial. But, how is the present case? He is not charged as an accessorial agent, but as a principal actor; he is charged as having, with others, levied war on Blannerhasset's island; but the others were stated to be unknown, and yet he was stated to have levied war. He had, therefore, no choice at all; for when he put himself upon his trial, he did it as every person would, expecting it to be proved (however unknown to him,) that he was a principal actor; and

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until the evidence came out, he had no idea of what they meant to charge against him. It was impossible for him to know what evidence would be produced, till it was in part brought forward. And then finding (as he knew before) that he was not on the spot, nor near the spot at the time, but more than 100 miles from it; and that the prosecution were confusing themselves, and not able to prove any thing against him, he thought it fully time to come forward, and prevent more unnecessary delay in the trial. He might say with confidence, "you have failed and must fail to make me a principal, because I was not there: then, as you only mean to make me an accessorial agent, you cannot prove *that* upon your indictment. I was under no obligation whatever to come to trial, but I did not withdraw my consent to hear what you can produce against me. I have heard: and now move the Court upon the principles of law and justice."

Having proved that the indictment is not formed so as that they can convict us under it, upon any evidence which the prosecution can offer; and that they have no right, even to bring us to answer to it, I shall make some few observations upon the question which is now before the Court.

There is one position laid down by us, which is—That admitting every thing be true with relation to Blannerhasset's island; and that every thing done there was with intent to subvert the government, (which I shall hold must have the principal motive, before it can be denominated "levying of war:") Still, as *no act* was done, it could not be denominated an act of levying war. This involves a question of very great importance—Whether peaceable citizens meeting in any place, whatever may be their object or design—no acts are done, or if any, they are, in their nature innocent—no force, of any kind, is used—Can that be considered an act of levying war against the United States? We lay it down as a position, Sir, that no war can be levied without force: it *must* be *an act*, and an *overt act*, and that of *levying war*. And, therefore, no levying war can be given in evidence, but what relates to the overt act *laid in the indictment*.

What then, Sir, is levying war? That is the question; they say that levying war is levying war! Not making war: but it consists in levying troops, in enlisting soldiers, and in preparing for something or other which they may suppose to be like war! I should rather suppose (from the temper and caution with which our Convention progressed through every measure of it,) that they wished to secure to the citizens every right which impartiality could demand. That, if they had meant by "levying war," enlisting soldiers, or even raising an army, they would have used those terms. The intent for levying that army might have even been declared; but if they stop there, they do not *levy war*, even if they declare it is with an intent to subvert the government. Levying an army is a preparatory step towards levying war, if that is their object; but a man may levy an army without levying war; that is, he cannot levy war without levying an army first. Thus, these are two distinct things; the one must be a preparatory step towards the other. That is, you may levy troops with an intention to levy war; but the preparatory

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act cannot be the treason, because the treason consists in *levying war*. In whatever sense, or from whatever authority we may draw our descriptions, it will always appear that *levying* war is *making* war: it is an *act* of war; and it is entirely immaterial which word is used.

But, says the gentleman, the king of Great Britain can *levy war* at any time, but it is the army that *makes* war: he levies the troops. Why, Sir, we are repeatedly levying and embodying troops; but I do not find that by *it*, we are levying war. But, *why* is it said that the king levies war or makes war, or does so and so? Why, Sir, they speak in their national character, the king being supposed to do every thing of a public nature; and the soldiers who do the act, are only supposed to be a constituent part of the nation, under the command of the king. Here it is said that the nation make war, because they do it in their representative capacity: those individuals who bear arms are only the particular active parts. Otherwise a constituent part of my body might do an act of violence; and I might say, that it was not *me* who did it, but only a part of me! In common parlance, in history, it is common to say, that one king or nation fought against another king or nation: when it is not the king and nation, but the constituent parts of it strictly: and there is nothing in the word *making* war, but what fully intends *actually fighting*, or being prepared to fight; and *levying war*, to our understanding, can be nothing else, in the meaning of the Constitution, than being so prepared, or doing the act intended. I shall therefore hold the true definition of treason in America to be, to *make war*; and that the war so made, must be for the purpose of *subverting the government of the United States*. Sir, the very *ex vi termini*, carries with it the idea of *force, violence, soldiers*. All the authorities of Great Britain and America, and all the indictments drawn on the subject of *levying war*, more than indicate it: they specifically state an act of violence committed. See *Messenger's, Damarree* and *Purchase's*, and *Fries's* case, and you will find in all, actual violence. But the gentleman has brought against us *Vaughan's* case, as distinguished from the rest. Sir, had there been no other charge against him to procure his conviction, his adhering to the king's enemies (France,) would have been sufficient; and therefore it was irrevelent.

SATURDAY, August 29.

Mr. Martin continued—He reminded the Court of the course which he had taken on the preceeding day; and reiterated his argument at some length. He quoted the cases of Vaughan and lord Balmerino, and discussed their relative applicancy, in allusion to the stress which had been laid on them by the gentlemen on the side of the prosecution.—9 State Trials 605, and 5 State Trials, 37.

I should not, said Mr. Martin, have taken this trouble, if I did not wish to banish from my country, such a cursed principle as that an assemblage of persons, without any *act* being done, should be considered as levying of war. The Court never conceived, in lord Balmerino's case, that even his marching, in military array, was high treason. The witnesses proved that he entered Carlisle in opposition to the king's forces. The attorney

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general to be sure declared it to be high treason, whether he possessed the castle and town or not; but this was only the language of an attorney general. But observe the case: the Court thought the day was of no consequence, since the levying of war was proved, by his entering into the city, and holding it against the king. Here is not a vestige of support to the doctrine of the gentleman, that military array merely is sufficient.

The decision in Vaughan's case cannot in any way be considered as conclusive. He had adhered to the king's enemies, and sailed in the ship Clencarthy, for the purpose of capturing British vessels: he was desirous of taking one ship, but finding it was too strong for him, he did not make the attempt. It was not attempted to prove this an act of war, however; but an act of adhering to the king's enemies. Foster, 218, makes a distinction between *bellum levatum* and *bellum percussum*, as will be seen by the reference and argument. He says, however, that enlisting and marching are sufficient overt acts, without coming to action. If he means an overt act of war, I will venture to say that he is unsupported by a single case: if he means an overt act of compassing the king's death, there may be many such. This shews us the necessity of forming a proper distinction in such cases. This, however, refers to Vaughan's case; where the acceptance of a commission from a king, who was the enemy of his lawful sovereign, was one of the acts of treason. The same would respect writing a letter to the king's enemy, giving him information.—Foster, 220; 1 East, 78. Did the Court, in this instance require that "he, with certain other persons that were with him," did levy war? No, Sir, because the very indictment specified the acts that he had done: he was considered as having levied war against the king, by adhering to his enemies.

1 East, 123, I quote, in order to shew that it was considered as an adherence to the king's enemies, and not as a case of levying war. But 124, there is a remark which is unsupported by any authority in the world; and therefore it shews the necessity of going to the books themselves, if we want to discover the truth; which I consider as of the greatest importance. Now he says that if an act of assemblage is proved, it is enough to prove the levying war. He quotes Foster 194 to support him. Now what is this authority? Why, *that if any one overt act is well proved, it is sufficient, whether the others are or not.* There is nothing in this that will justify the conclusion that arraying in an hostile manner shall be called an overt act! But East makes no distinction between overt acts of compassing the king's death, and other treasons.

1 Hale, 122, *Lowick's* case; 4 St. Tr. 718, he quoted next. Why, Sir, that was for compassing the king's death. 608 M'Nally.

Chief Justice. Does the indictment in *Lowick's* case, charge only compassing the king's death?

Mr. Martin. The indictment, Sir, is specific: it lays several acts in support of the charge of compassing the king's death. He also quoted Loujer's case, 6 State Trials, 229. This was also for compassing the king's death. The charge was an overt act in publishing a treasonable paper in the county of Essex, tending

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to promote insurrection.—9 Geo. 1. It is clear that all these are cases of conspiring to kill the king; and for want of this distinction, an idea has crept into America, by which they would make us believe that enlisting and embodying men is treason, when in fact it is nothing more than conspiracy, which in America cannot be turned into treason.

In every case in Great Britain, where the indictment has been specifically for levying war, and nothing besides, we have uniformly found that the parties not only assembled, but that violence was committed. Benstead's case, which Foster dwelt so much upon, and where he could find no act of violence, is not exempt from the position which I have taken; if we take its circumstances into view. Here was a presentment against the Archbishop; and the object was to force, *by violence*, the king to remove that minister from his office. This was considered an act of levying war, because it was an act of violence committed on the house and property for such a purpose against the king.

1 Hale, 146, expressly determines that the detaining of one of the king's castles, *without force*, is not treason. Foster 219, expressly affirms, (and it is no where contradicted,) that if *actual force* is used in keeping possession, it is actual war. Here, actual force is necessary; no doubt of it: for whether it is to *keep* or to take, it is the same: it is treason: and whether it be adherence to the king's enemies, or adhering to, or abetting in treason, the taking of a commission, enlisting men, writing a traitorous letter, &c. all were held to be treasons.

Chief Justice. Suppose a fortified place in England to be taken by a rebellious army; and, afterwards, a distinct detachment, which had no share in taking the place, should be put in possession of it; and it should so happen, that the place should never be attacked, so as to require forcible resistance: now you state that they would be traitors upon the principle of being aiders and abettors of those who took the place by force; do you mean to contend that they would not be traitors upon the principle of levying war. I put this case to understand the force of your argument.

Mr. *Martin.* Certainly, Sir, they would be guilty of treason, by aiding and assisting rebels: and it would be taken upon the principle of levying war. However, I have confined my arguments to the particular cases written in the books. I do not know of any such a case in the books; and therefore I am not able, at this moment, to express my ideas upon it.

The argument I mean to prefer, is, that there must be an *actual force*, for the purpose of levying war; and in every instance where levying war has been laid, actual force has been proved, and where actual force has not been proved, it has been that species of treason of compassing the king's death, or adhering to the king's enemies. And again, Sir, there can be no single doubt but where the case is not clear, the Courts are bound to decide in favour of life. Sir, jumbled together as the cases are in some of the British precedents, I call upon the gentleman to shew one single indictment to the Court, where *levying war* has been laid, unless actual violence has been proved.

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Now, Sir, let us turn our attention to what has passed in America, in the few cases which have occurred here of treason, as it was called. As to one insurrection or the other which has occurred, there was not a single case but where the parties were proved to be, either themselves guilty of force or violence; or that they were connected with others who did commit force and violence; and that they were aiding and assisting in that violence. But whether they were aiding and assisting, or doing it themselves, we do not know what would be the degree of guilt, under any authorities that we have. I then lay this down as a position, that if a *dictum* be found on any position, as to the first or last of the insurgents, that it is totally extra-judicial, and deserves no possible credit, because no question arose to call for an opinion upon the subject. Unfortunate indeed would it be to the people of America, if the doctrine of the gentleman was to be universally adopted: that there was no danger but to persons guilty of treason. Sir, may not government hatch up supposed crimes against those who may be obnoxious? Are we proof against envy, and false accusation? If we are not, it is necessary that every case should be examined upon principles of law and propriety: and that there should be the aid of the fullest argument which the ability of our greatest lawyers can afford: and that we shall not depend upon the loose *dicta* of writers.

But, Sir, the fountain head should be applied to; and every thing must be examined from that source. They have placed in array against us, the decision and opinion of the Supreme Court, in the case of Bollman and Swartwout: and, therefore, they think it is in vain for us to shew principles of law or precedent from Great Britain, because their principles of *common sense* are too strong for us, and that they ought to be adopted. They think that we are already precluded by the authoritive decision of the Supreme Court. It is well known that the Grand Jury would never have found an indictment if they had not misunderstood that opinion; and that my client would not have had his life at hazard. And, *Great God!* Is an extra-judicial opinion to deprive him of his life when he is innocent! But, Sir, let me look at this opinion and its consequences. I think that I can prove that the gentlemen have misunderstood it: but at all events, it is extra-judicial, and that is enough.

Foster, 36, has been read by the gentleman who went before me on the same side; but, as the sentiment cannot be so fully impressed in any other way, I shall call all such references extra-judicial; because they have no case before them, upon which the arguments of counsel can be received. But Foster says, that such things ought to have very little weight. Vaughan, 382, was one of the authorities referred to; but they did not think it worth their while to answer it, because it was too strong for them. As to the doctrine established by the Supreme Court, if all the evidence was now to be produced, the gentleman would not discover one item of evidence that would in any way tend towards the conviction of the accused for any thing done at Blannerhasset's island; for he was two hundred miles off from that place. He would not have found one word about Blannerhasset's island in the whole testimony or argument. He would

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have only found Eaton's, Wilkinson's and Donaldson's depositions, and the letter in cypher; and the evidence of the two officers who brought them from New Orleans. The whole argument was, whether Bollman and Swartwout were to remain under a commitment for treason or not. I shall not take the trouble of reading over the opinion of the Court, because I know that it speaks for itself. The Court decides, that there is not, upon the whole testimony, the least proof that treason had been committed by Col. Burr or any other person, either by act or intention: but, that if it did prove any thing at all, if even so bad, as going on with the expedition against the Spanish provinces. Op. Sup. Co. sec. 41, and 50: But in the latter case, who knew that there would not be a war between this country and Spain? It was an universal opinion, that there would be, if there was not then; in which case it would (so far from incurring blame to him) have been highly to his honour. Your honours will remember the period and circumstances of our army and relations prior to that time. However, from what cause I will not now examine, but a war did not then take place; and the American forces and those of Spain withdrew from each other. Therefore, instead of a high misdemeanor, every honest American heart might have rejoiced at the patriotic attempt to subdue his country's enemies.

There was no point before the Supreme Court which could call for, or give validity to their decision. If the Court did make such a decision, I have the authorities of Vaughan and Foster, to shew, that no respect can be paid to it; because their decision was made upon the question, whether Bollman and Swartwout should be discharged from their confinement under the commitment for treason. No attempt was made to implicate them, but through Col. Burr, whose case we are supporting; and yet not an item of testimony could fix an imputation of treason on them, or on any one. It was that they should be discharged under the *Habeus Corpus*.

But, again, Sir; remember the circumstances under which the Supreme Court were at that time: there were but four Judges out of six that were able to sit in the Court; and among those who were absent, was a gentleman of great talents in law, Mr. Livingston, who was obliged to go home from his judicial duties, in consequence of domestic affliction. And yet these four Judges, in an extra-judicial manner, undertook to settle a law of such infinite importance to the people of the United States! No, Sir, they never meant to settle that law in such a situation.

But, Sir, the gentlemen say, that they understand the opinion correctly; but those gentlemen engaged in council with me, say that they do not understand it. I care not, however, whether we understand it or not, because it is not binding as a law of the land; they might as well have produced the ballad of *Chevy-chase*, as decisively binding upon the case. It is immaterial to me, whether they or others do or do not understand it right: they have brought it forward, because they think it will serve their purpose, and are amazingly pleased with their discovery; and they do not think themselves dishonoured by believing, that they have an unanswerable quotation to depend upon, (as they believe.) I do not say that they are dishonoured by it, but I

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say that I do not think there is any great degree of candour in the gentleman, in forestalling this examination, by telling the Judge, "Sir, you have said so and so already on a question of this nature; and we expect you to say the same now!" I have shewn as much as is necessary upon this part of the question.

I shall now make some few observations which relate to the great Constitutional question, whether persons who would, in G. Britain, be merely accessorial agents, can be guilty of levying war in the meaning of the Constitution of the United States, and thereby be guilty of treason. And here let me observe, as to the argument, that the person who would be most guilty of the crime of treason, might pass unpunished. Sir, the question is not, whether a person counselling or commanding treason to be done, is guilty of the crime or not? the simple question is, whether he is guilty of the crime of *treason* or not? No person would say, that he who procures another to do the crime of treason, should pass with impunity. It is not contended, that crimes which would, if completed, amount to levying war, should be permitted to go on without restraint. Persons who advise others to commit a crime, are liable to be punished by the laws of the country. But nothing that may be denominated coming towards levying war, can be denominated an *act* of war; and nothing is treason but acts of war, and done with a view to change the government of the United States. Every person is criminal that is making preparations for such a purpose; and government, whenever they have good reason to believe that preparations are making for such a purpose, have an undoubted right to make use of the force of the country, so far as the laws will hold them out, to suppress, and put an end to any such measures. The question, therefore, is not, whether government is to look on and see all the preparations made and completed, which is intended for its own destruction, until it is brought to such a pitch that the blow may be struck successfully? No, Sir, government has a right to prevent its being brought into that situation which may be denominated levying war. And, if I am not mistaken, so careful was Congress last session, that they expressly provided a punishment for such preparatory measures. I may, however, be mistaken; but I know such a bill was before Congress; perhaps it did not pass. It is not material however, since the power is indubitable. The only question with us, is, whether the person who advised or prepared, should be considered guilty of high treason or not? Here then, Sir, we must take a view of the whole objections that gentlemen have been making. If the person who prepares or advises treason, is not guilty of treason, what a lamentable situation indeed our country is in! As though they could not take a single step to prevent levying war! As if, because the person who advised levying war, could not be punished as a traitor, he should escape punishment altogether. This is begging the question altogether; and is a plain contradiction to fact. Sir, can the person who advised levying war, be said to have levied war? I am sure, much as I am in the habit of recurring to British precedents, I have not found any affirmative answer, except it be in compassing the king's death. Here the question is different: it is whether the person who advised levying war, *did* levy war? the

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gentleman says, that he had all the guilt of it. Be it so: but let him be punished for the *guilt*, but not for the *action*, because he never did it. But what prevented the framers of our Constitution from declaring that persons who counselled levying war, should be guilty of the treason of levying war? Levying war is an *open overt act*; an act that must be (as the authorities say) *done in the eye of the world*; which any body might clearly see is going on. We know it must be a public act; and though the word *public* need not be in the indictment, because every levying of war must be of itself an open, public act; yet the authorities shew, that it must be an act of notoriety, with which every body is acquainted.

We have had names, Sir, for two rebellions which have occurred in Pennsylvania: one is called the *whiskey insurrection*; and the other the *hot-water insurrection:* if I were to christen this, it should be called the *will-o'the-wisp*—for it is here, there and every where; and has never troubled the brain of any body, except that trouble came from newspaper arguments and deductions, such as they were. It is impossible to levy war in the way we are charged; and the truth or falshood of which could be discovered with ease, when it is said that a war was made in such a city or such a town; and that they marched through a certain place to take such a town, &c. the truth or falsity would be easy discoverable. But, except it were thus open, there is nothing but confession can be received. It is not declaration made before the fact, that is to be received as an evidence of intention; nor is it acknowledgment afterwards, unless it shall be made publicly, in a Court of Justice. If a thousand persons were to come forward and swear that the person did a certain act, with a treasonable intention, no such evidence would be accepted in a Court of Justice, except the acknowledgment of the person himself, in a Court of Justice, as to intention. If others come forward and prove his having made any confessions of whatever nature, it would not be received, because of the difficulty to disprove an acknowledgment, or guard himself against any such thing. What then is the situation of an adviser: advising, is not an open act: it is an act of private counsel; a secret act, known only to few. In order then to guard against the evil designs of any administration, (the present I suppose is one of the most merciful that can be) and the convention did not know that America would be blessed with so good an one, or they need not have been so careful: but, not knowing that, they were willing to guard against the worst that could be, and place it out of their power to destroy any man, by receiving any sort of act under the denomination of an overt act; and any sort of evidence to support the charge: and thus put it out of the power of even a corrupt administration to destroy a man, by saying that a man was constructively present where he was not; and receiving evidence of his intention, by words said to be used by him, to persons whom the administration might hire, to facilitate his destruction. Even letters may be forged and brought against him; and which would be received by a packed Grand or Petit Jury; which such an iniquitous state could readily procure. And how is such a person to secure himself against the effects of perjury, or detect

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it? The act is not of a public nature, and therefore incapable of being proved or disproved.

But, Sir, once the Constitution wisely determined, that no man should be considered guilty of treason in such a way: they did not risk the life of an individual, to be exposed to such a charge of treason. They have not secured the guilty man from punishment, but they have secured every man from being injustly sacrificed by his enemies; whether in a public or a private capacity. In volumes of antient history, we have exhibitions enough, to convince us of the wisdom of those guards which remove the innocent man from danger, while it suffers not the guilty to escape.

The gentleman who so ably opened this argument, has stated, and correctly, that the Constitution is to be considered in a different light from a statute law; that it is a solemn compact, not merely made between one State and another, but between all the individuals of the United States; and they have thereby solemnly pledged themselves to all who unite in the government to abide by it; and that this Constitution should never be changed, unless by a mode which itself has pointed out, wherein all the States have a compleat voice. But when it comes before a Court of Justice, the gentlemen are willing only to consider it as a Supreme law: and why do they consider it so much? They cannot avoid it, because it is the Supreme law of the land; and what efficacy has it, but that if Congress pass any law contrary to it, the Judges should not be bound to carry it into effect.

Farther. It was said, that the Convention meant to guard against constructive treason. I have no doubt but they meant to make the question as clear as they possibly could, upon which there could be no doubt. But the gentlemen say, that the doctrine they contend for, does not create constructive treason.

Now, Sir, here again I must revert to the Constitution, and say, that by it there are only two species of treason: one is levying war; and the other is adhering to the enemy, giving them aid and comfort. Then, Sir, only these *acts* can be denominated treason. Does the Constitution say, that he who *advises* these things, shall be guilty of treason? Does the Constitution say, that one who comforted and secured one who has done these things, is guilty of treason? No, Sir: no person will say, that a person who has advised another to levy war; or who has advised another to adhere to the enemies of the government, has *done the acts* of levying war, or adherence to enemies. How, then, can they make such a person guilty? First they would make him *constructively* involved in the guilt of levying war; and then they would make him constructively present, and an *actor* in levying war, when he was not present; and in short, when there was no war levied.

Surely then, construction does not, and cannot make any declaration or words used, or counsel given, to be levying war: and consequently, any person who was not present, can only be considered as *constructively* present: and the gentleman cannot make us guilty, but by the application of this construction. Never did I expect to hear words from those gentlemen that would tend to encourage the idea of constructive presence; or

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to have heard the doctrine supported, that an assemblage, *without force*, was a sufficient act of levying war; or sufficient to make a person guilty of treason. Our Courts never went farther than to say, that those who were guilty of actual force and violence, are guilty of treason. It is not clamour that can extend the doctrine beyond its proper limits: it is nothing but a proper, legal decision; and yet, without such a decision, the gentlemen wish to extend the act, without any violence being offered to treason.

I know it to be the sense of that part of the community with whom those gentlemen act, and many with whom they do not act, that our Courts of Justice have gone, at least, far enough in what should be considered treason: and many think they have gone too far; and that our Courts of Justice never will extend those principles farther than they have; whilst they remain so incorrupt as they now are.

The gentleman who went before me, quoted Throgmorton's case. There is no doubt but that the Court who tried him was the most wanton and corrupt: that he was doomed to the scaffold, and that the Court meant to send him there: but a Jury of honest men acquitted him, and put him out of the way of the vengeance of the crown. It is on such an occasion, that we sometimes, and rarely, see a Jury disregard the opinion of a Court, and save a victim from the punishment which a bloodthirsty government might doom him to—1 St. Tr. 68, A. D. 1554. But was it ever heard in America, or in England, that a Jury was to disregard the opinion of a Judge, so far as (not to save a villian from the scaffold, but) to put to death an innocent man! No, Sir: on the contrary, the whole history of jurisprudence will establish the principle, that when a man is trying for his life before a Court of Justice, where there is an argument in his favour, and where the Court say that he ought to be acquitted; that a prosecutor should say to the Jury, "you ought to find a general verdict, contrary to the opinion of the Court." That phœnomenon has never till this time been heard of in our Courts of Justice; and even in Great Britain, I will venture to say, that a prosecutor who would do so, would meet universal detestation. I do not say it will be the case with the prosecutor on the present case; but I know not for what purpose some observations were made; unless it was to favour such a doctrine. These cases are not held up to be followed by the American Judges, but as beacons for them to shun such a course as has been followed under those days of terror.

The gentleman who first opened this case, adverted to the case of Lady Lisle; but the gentleman could not discover what that case was read for. The Court very properly explained what was meant by it. It was not merely to shew the conduct of the bloody Jeffries; but to shew, that in every one of those indictments, the person accused was charged *specially*. He then went on to shew, that the principle of common law could not be drawn in, to aid the idea, that he who commanded treason, should be considered guilty of treason. It is clear, that what is meant by common law, is only to direct our Courts, in a general sense, to understand what is meant by the various species of

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crimes, and the manner of proceeding to try them. As, for instance; if a statute shall say, a man that commits murder shall be punished so or so: that he shall be tried by a Jury, &c. Why, it is necessary to resort to common law to know what is the meaning of "murder," and of "Jury," &c.

But here is a different question: it is whether principles of common law, as they are in Great Britain, can be brought forward and applied in this country, so as to make a person guilty of offences *at common law*, that are not made so by our Constitution and laws? Upon that subject I am, and have always been, of the opinion, that no person could be punished, but for an infringement of some of the laws, or some part of the Constitution of the United States: and therefore, I do perfectly agree with the opinion in the case of Worrel: that where there was no provision made by the law or Constitution to punish an act, it was not considered to be a crime, however such an act might merit punishment in itself. It belonged to the legislature, and not to the Court. How it may be in the state of Courts, is a different subject. There is now pending, I understand, in Connecticut, a common law offence; no less than that of speaking disrespectfully of Mr. Jefferson!

Then, it being admitted that there was no common law in the United States, when the Constitution was formed, it follows of course, that we should appeal to the definition of treason made by the Constitution: which is only that of levying war, or adhering to enemies. It is, therefore clear, that persons who *advised* to either of those crimes, cannot be considered as *actors*; and therefore, not guilty of the crimes.

But, when the gentleman failed to prove the guilt by the Constitution or law of the United States, or by common law, he endeavours to do it by common sense.—"In *common sense*, says he, an *actor* in treason is guilty, because he is so in *foro cæli!*" Why, Sir, when we mortals talk in that strain, we are only putting ourselves in the place of the *Deity*, and holding Court for him over his creatures. Why, in *foro cæli*, we do not know what would be criminal: but if it may make him guilty as an accomplice or partaker, yet it cannot make him actually present, creating war.

Mr. *Martin* here referred to Mr. Wickham's argument, and to Mr. M'Rea's answer thereto: to the citations of Dabart, 98; and Hawkins, ch. 37, ch. 2, &c. and to their reference to cases of Piracy, &c. to shew that there could be no constructive agency, aiding, abetting, &c.—for he said, it would have been extremely easy to have demominated accessaries in any state, whether before or after the fact, as principles in treason; if the framers of our Constitution, or law, had so thought fit. But there is no such thing: they have confined it to *actors* themselves, as in case of piracy. Indeed, as Mr. Wickham said, it is clear, beyond a doubt, that the legislature did not conceive that receivers and comforters, or aiders in any respect, could be guilty of treason, within our construction, although they are within the construction in Great Britain. And why, Sir, is it clear? Why, because they have made a special provision, that those who should break gaol, and let out traitors, after conviction, should be pu-

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nished with death. Now, in England, this was treason; but here it is not. But, farther, they have passed a law, that if a person should assist to make escape, a person charged with treason, and not convicted, he should be fined, not exceeding five hundred dollars; and imprisoned, not exceeding one year. "Laws United States, v. 1 p. 110."—Now in Great Britain, a person who breaks gaol, and lets out a person charged with treason, is considered as a protector; and if the person is afterwards convicted of treason, he is punished as a traitor.

Now, if receivers and protectors of traitors ought to be considered guilty of treason, advisers must be so also: and it would amount to this in America: that a person who aided the escape of a person accused, would be fined five hundred dollars; whilst he, who should comfort a person so escaping, would be considered a traitor, and suffer death! This was Lady Lisle's crime, for which she died. If this had been the opinion of the legislature, why did they not engraft it in their law, for the punishment of crimes: if our Constitution had embraced any other than this idea, they would have conclusively fixed it. And, indeed, we see under what Judges, and what authorities this *horrid* principle of construction was adopted in England. What does Blackstone say of them? He holds them in abhorrence; but, had he held it up as an unprincipled and unfeeling disposition of the Judges, to gratify tyrannical kings, he would have been nearer right.

Judge Tucker has erected to himself a monument, much more durable than *marble* or *brass* in his invaluable notes on 4 Blackstone. Marble may moulder and decay to atoms; Brass may consume to a shapeless moss; but *Tucker* will last, whilst the press shall be able to hand down his name, from generation to generation. Every moment that his notes shall be read, he will be blest by the people of America, for that production which has settled the doctrine of treason. And if the principle shall now be applied, and adopted by this enlightened Court, he will be blest, as the distant cause of that justice, which it cannot fail to administer. He has shewn, that the principles in Great Britain *are not law;* for that they were passed in a time, when their example ought not to be quoted. They were attempted to be supported in the case of Sir. N. Throgmorton: at a time when the most blood-thirsty Judges sat; and under a reign, (Mary) when it was determined to destroy. Stanford, who was the prosecutor, soon after he was made a Judge, wrote his pleas of the crown, and wrote down those principles as law. From him it was copied, as Tucker says, by every elementary writer since: Lord Coke, Hale, &c. just like a flock of sheep: one jumps over first, and the rest follow him, whether it may be right or wrong. To this inestimable work of Judge Tucker, I refer the gentlemen for examination, and the Court for decision; I therefore shall not read it. He did not leave these things to go to posterity without animadversion. He has told you *awful* truths. He has told you that faction is the same, let it be where, and when it will: and that a prevailing faction will destroy a man with as little sensation as a *philosopher* will observe a rat in the vessel of an air pump struggling with death. Sir, these very gentlemen,

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would, on any other occasion, have pressed the doctrine which he has laid down: and they *must* revere and respect him.

It is impossible for me to doubt that the Judges of the United States, will recognize this principle of construction. They will view its origin, and observe its consequences with precision; and not lean to one or the other construction.—East's crown law, p. 100—" advising, procuring, or instigating to levy war, is not levying war. War must be levied by some other person; and if it is not levied, the party who advised it, has been guilty of no offence whatever, that I know of. Bacon, in his abridgment, says, that an offence is not to be judged high treason, unless it be clearly, without argument or inference, within some act of parliament: for no statute is to be taken constructively. I apply this, Sir, to our Constitution, and say, that if it be not clearly, without argument or inference, within our Constitution, in its words and meaning, it cannot, upon principles of justice, be considered *treason*. In Ann Guy's case, she had received two guineas, knowing them to be stolen. It was the opinion of the Court, that in such a case there could not be an accessary, after the fact, as has been argued. She was acquitted; because, notwithstanding the argument, the Judges decided that all penal laws ought to be construed *strictly*. This shews how cautiously, in all penal crimes, every thing must be conducted. And if it is so in cases of small importance, how great caution ought to be observed in carrying on and trying a case between a *government* and an *individual*? The government is bound by its solemn compact, to protect the rights, liberties, and lives of individuals; and not, in any way, persecute them. How then can it, agreeably to that compact, proceed against any one for treason, unless he *actually* does "levy war," or "adhere to our enemies?"

The next question, may it please your honours, which I shall consider, is—Whether this Court have the *right* to direct the Jury in the present state of the case?

The Court and Jury on the present occasion, have heard all the evidence which the gentlemen say they have to produce, in support of their charge, that there was an overt act of levying war committed on Blannerhasset's island. The Court are applied to, to instruct the Jury, admitting every thing that has been sworn to, to be true and correct. We say, that all that they have heard does not amount to levying war: we also say, that Col. Burr was not at Blannerhasset's island, but at a great distance from it at the time. We say, that no acts or declarations that took place after the party (among which Mr. Burr was not) left the island, and went down the river, can have any effect as to what was done on the island; and particularly, respecting a person, who could not be supposed at most, as more than accessorially guilty. Upon these general principles the Court are to decide; and they are to decide upon a full view of those facts which have been produced; and say, whether the act of levying war has been committed.

The true question is, whether it is the duty of the Court or not, to prevent testimony to be given to the Jury which is irrelevent.

It cannot be doubted, but that the question, whether certain acts are, or are not, acts of levying war, is a question of law.

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This question, like all others of the kind, consists in law and fact: the fact is the province of the Jury to determine: the law is the province of the Court. The Jury are to say, whether it is true as charged: the Court are to say, whether even if it be true, there is any thing criminal in it or not. This question may be brought before the Court in different ways: it may be brought by *special verdict*, to find upon what facts may be found to be true, and those only. It may be brought before the Court, and taken from the Jury by way of *demurrer* to the evidence: that is, that the evidence is admitted; and the party calls upon the Court, by demurring to that evidence, to decide upon the case, whether the party is guilty or not.

Chief Justice. Can you demurr in a criminal case?

Mr. *Martin.* Yes, Sir. If there is no authority against it, I presume that there is sufficient ground to support it.

Mr. *Hay.* What is to become of the Jury then?

Mr. *Martin.* What becomes of the Jury in a civil case? The Jury are bound by law, whether it be in a civil or criminal case. By demurring to evidence, it withdraws the case from the Jury, as much as demurring to an indictment would do it.

The third method is, to admit that the facts which have been sworn to, are true; and then it is the duty of the Court to instruct the Jury what is the law upon those facts. That is the first part of our present prayer. We pray the Court to instruct the Jury that there is no overt act done on Blannerhasset's island, even if the charge of levying war be true. The other ground of inadmissibility, is upon this principle: That after it is proved and admitted, that he is not guilty, but as an accessorial agent, yet the indictment charges him as an original *actor* on Blannerhasset's island, where he was not present. We say, that no evidence of acts or declarations which took place after the party left that island, can be relevent testimony to prove an offence upon Col. Burr; and I will undertake to shew, that it cannot be received.

The charge is for levying war on Blannerhasset's island. Now, in order to find him guilty of that, you must prove what was done on the *island*: for, if there was war *actually waged* at the mouth of Cumberland, that has nothing to do with what was done at the island; for that would be directly contrary to the case of Vaughan, which he relied on, upon the principles of *common sense*: for if he was guilty of one offence, in carrying off the custom-house boat, that is no evidence that he was guilty of sailing in the Clencarty against the king. This case must stand or fall upon the overt acts done on Blannerhasset's island: And the law has solemnly settled it, that no overt act can receive additional evidence from declarations or expressions used elsewhere. The question is, whether he committed the act on Blannerhasset's island? Nothing that he has declared since, or done elsewhere, can be given in evidence. And added to this, there must be two witnesses to prove the same identical overt act. And here, Sir, lest there should be a doubt upon your mind, I must call to your attention an expression of Judge Iredell, in Fries's case. He has said—"that after having proved the overt act by two witnesses, it is proper to go into evidence to shew the course

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of the prisoner's conduct at other places; and the purpose," &c. Fries's trial, 171. He also states, (as reported,) that declarations and confessions of the party have been let in, in Great Britain, to strengthen the testimony—ibid. 172. I believe, Sir, it is no such thing: I believe that Judge Iredell was too correct in his law-knowledge, to mean to say any such thing. He has gone on to state, that if an hundred persons were to swear that the prisoner said so or so, by confession out of Court, it could not be received. But he is *made to say, in the book, to the Jury* "you will consider whether any part of his confession, (p. 80,) has not before been proved by two witnesses: if it has, it goes to corroborate what they say: if it has not, you are to disregard it."—p. 172. So confession before a magistrate may be brought against him! My God! what doctrine is that! If the Jury believe the two witnesses, why, to be sure, they can want no additional evidence; but if they do not, what? Does our Constitution allow additional testimony to be received to make them believe it! If they will not believe two witnesses, standing as they do before them, and they are ready to acquit the prisoner, it would be a direct violation of the Constitution, to add additional testimony, by way of proving the declarations of the party himself. Sir, it might be the case, that the party himself would thus condemn himself. But, supposing it to be Judge Iredell's idea, he has confined it to the confession of the party before a magistrate. This, therefore, precludes the weight or use of confessions or declarations made elsewhere: since all must be done in such a certain way, and relating to the precise circumstances laid in the indictment—to wit—to acts done on Blannerhasset's island.

That the Court is the proper tribunal on all occasions to declare the criminality of an act, when the facts laid down are admitted upon a motion, there can be no doubt: that it is the province of the Jury to determine upon facts, is equally certain. The gentlemen themselves admit, that it is the right of the Court to declare what is levying war. But they have eagerly seized upon the opinion given in Bollman and Swartwout's case, by the Supreme Court, as to what is the character of the crime of levying war; which, they say, is binding on this Court and Jury. Acknowledging the right in the Court to say what is levying war, by their own reference, we also say, that it is the right of this Court to say whether the acts which were done on Blannerhasset's island, if true, as has been related, did amount to an act of levying war.

Now, Sir, whether testimony should be admitted as relevent to go to the Jury, has always been considered as the province of the Court to decide. No man has ever doubted that this was always their exclusive province: when it is given to the Jury, then the Jury are to decide upon it: but whether it is relevent to the point before the Court, the Court *must* decide. A Court who would hesitate so to do, would little deserve to sit in the seat of Justice to dispense the spirit of the laws to their country. It was never attempted to be argued before, or objected to, even by those men, who have been the most industrious and violent in favour of Jury powers. But say the gentlemen, let all the evidence go before the Jury, for they are the proper persons to decide whether it

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is of any weight upon the case. Sir, I deny it: they have no controul over the power of the Court to say, whether evidence ought to go to them or not. We are asking, then, nothing for the Court but what is their clear and decided province to judge upon. We have shewn in a variety of cases where this has been done. Ambrose Rookwood's case, 4 St. Tr. 661; and Lowick's case, 4 St. Tr. 718. The Court were called upon, in each of these cases, and determined upon the motion of the relevency of witnesses offered; and to say, whether there had been two competent witnesses given to the overt act. The desultory conversation which then occurred, terminated in this, that the Court had determined that there were two witnesses who had given evidence of the overt act. If their opinion had been contrary, they would have said to the Jury, "there were not two witnesses to the overt act, and you must acquit the prisoner." The Court in those cases, told the Jury, "you are to judge of the truth of the testimony, and to find your verdict accordingly."

In an action of *trover* and *conversion*, and no *conversion* is proved at all, the Court instruct the Jury to decide according to the evidence; but inform them that the evidence has failed to establish the action. And if the Jury were to disregard this advice of the Court, the Court, on motion, would set aside their verdict, and order a new trial without hesitation. So in cases of money concerns, the Court will instruct the Jury, to find upon the state of the account according to evidence; and of the credits proper to be given. The Jury must find upon such a state of the case. So in England, in the case of a bond, where there is no statute of limitation, the Court would say, even if it was of twenty years standing, that it was for the Jury to determine whether the plaintiff had been paid; if not, they must find him a verdict. So with respect to cases in Cowper and in Coke, respecting lands. Lord Mansfield, in twelve reports, cites a case of this sort, and says, that the Jury are to ascertain the facts, which if they are satisfied with, they must give a credit accordingly; otherwise, it must be contrary. A quotation also of Mr. Botts, from Leech, Cr. Ca. 422—as to fradulently obtaining goods, under false pretences. It was the province of the Court to declare what was receiving goods under false pretences; and then, if the Jury should find, from the evidence, that it amounted to so much, the person must be deemed as having committed the crime alleged: otherwise a contrary verdict must be given.

They have charged us with omitting the proper time when we could have availed ourselves of our advantage, if ever. Why, Sir, we have proved that it was our right: and as to the time, we were willing to hear all the evidence that related to the transaction charged in the indictment, which was charged on Blannerhasset's island. This, upon their own principles, is the only time we could have done it with effect, because we were not to know what evidence they could bring. Strong's reports, 127 and 497—respecting *false tokens* and *profane swearing*. The question of fact, whether the person did do it or not, was for the Jury to decide; but whether it amounted to that crime or not, was a question of law, upon which the Court were to say. So, 2 Burrows, 2471: and 2 Strange's Rep. 476—respecting *gaming*.

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The Court had the right to say, whether the act charged was an infringement of the law of gaming; and the Jury were to apply the evidence.

2 M'Nally, 547—was quoted with respect to this: the gentleman who spoke last on the side of the prosecution, made some observations, the correctness of which I shall examine. Indeed the gentlemen have freed me from examining many authorities in their favour, because they have not produced many: and of the few, they have repeated them over and over again. The violation of the rights of Jurors is the strain of their declaration. M'Nally speaks of the times when it is proper for the Court to decide, from Major Oneby's case, 9 St. Tr.; 2 Lord Raym, 1493; and 2 Strange, 773:—It is when the facts are found by the Jury, "the *Court* are judges of the malice, and not the *Jury*—the Court are also judges of the facts found by the Jury, whether, if the quarrel was sudden, there was time for the passions to cool; or whether the act was deliberate or not." The position is as familiar and clear to every person as any thing can be in law.

Mr. *Hay*. Mr. Martin does not understand me at all. I stated, that the position was predicated upon the necessity of the case before the Court, and read Fost. 257, in support of the argument used.

Chief Justice. The fact is, that Mr. Martin has given the point a very different appearance to what it had at first. The motion was, that the Court should instruct the Jury as to the overt act; but still with a view to the admission of all testimony with relation thereto. Mr. M. takes it up upon the general principle to instruct the Jury. Your arguments (to Mr. Hay) were drawn from a view of the position, as first laid down, and, therefore, embraced a different course from what is now followed.

Mr. *Wickham*. We say, that there is no evidence, whatever, given of an overt act committed in Virginia. That is our position; and, therefore, gentlemen ought not to relate what was done at Cumberland river, or any other place out of the district. Our other position is, that there is no evidence of the presence of Col. Burr, at that place; and, therefore, there can be no evidence, that he was at all engaged with those who were there: or if you prove that he was engaged with them, he not being present, you cannot bring him to answer, until you produce the record of conviction of some one to whom he was an accessary.

Mr. *Martin*. Though the gentleman did predict, that whatever time I might take up, there would not be six men in the Capitol who would understand me, yet I have had the happy faculty of understanding him: I understand him wishing to go, with his evidence, down to Cumberland; which we say, and flatter ourselves we prove, is irrelevent with the indictment; notwithstanding their declamation about the rights of Juries. That this position is as clear and common as any thing in the law, every child in the profession must know as easily as he knows his a, b, ab's. This, Mr. Botts clearly proved; and proved that there was no criminal act at Blannerhasset's island. In reference to M'Nally, the gentleman said, that if he had looked a little farther into the case of Major Oneby, he would have found this principle: that the Court will instruct the Jury

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before they give a verdict in such a case as that. Why, Sir, this is where we are now: we say that the Court *ought* to instruct the Jury upon the face of the facts exhibited. Why his argument cannot interfere with M'Nally, who says that the Court may instruct the Jury, either with a special verdict or without a special verdict. The gentleman says, that reporters will very often express themselves incorrectly; and, therefore, he did not like to trust to authorities. Why, to be sure, the gentleman has found out a new sort of forensic learning, called "common sense." This would be a different kind of fabric, indeed, for us to build upon; but not less uncertain than that which is deprecated: for there are very few, indeed, that will agree upon principles of common sense: we shall find as many different phases and images in that, as is to be found in human nature. I will agree with the gentleman, that the Judges in Great Britain have adopted rules of evidence at some time, as bad as this: inquitous, indeed, they were; and, in direct violation of those laws which were passed to secure the lives of the subject from the fangs of tyranny. The law is clear and decisive, requiring two witnesses to an overt act of levying war; but what does their practice say? If one overt act of treason is proved in the county where it is laid, another of the same kind might be proved in another county, by a different person. What is the consequence of this absurdity? Why, it leads precisely to the same, as the opinion of Judge Iredell, provided he ever did express such an opinion—that other testimony might be let in to assist or support the proof before given, which was, in itself, insufficient; or to prove what was already proved! But here, even if it must devolve upon the Court to say, whether the overt act in the indictment, has been proved, by one or more witnesses, in order to let in other proof: they are to say, that if the Jury believe what has been sworn to be true, then there is sufficient evidence of the fact. Upon this belief then, the other evidence is let in.

1 East 196, 197 was read. Here the gentleman as well as East, was "caught napping;" for the cases relate to conspiracies to take away the king's life; and here the Court judged of the connection between the parties, and all consequential evidence to affect the prisoner was admitted. The Court must, in the first instance, judge how far the connection was established, previous to letting in other evidence: if they think it is established sufficiently to be believed by the Jury, who is ultimately to decide, then they let in the other testimony; otherwise not; and if not established to the satisfaction of the Court, they direct the Jury to find a verdict of not guilty. The gentleman says, East was caught napping. I think he must have said so, because he himself was not altogether so capable to judge about legal distinctions as I am; for he confesses that he is not very able to judge about them; and therefore he is not competent to make the practical application to this case. In Jackson's case, there was proof required, first, that the prisoner was connected, and then farther evidence was to be let in to shew what he had done.

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As to the great principle of law which it has been attempted to establish, I shall make but a single observation; after which, I shall take up certain *ideas*, expressed by the Counsel, which may require some notice, though I do not call them arguments. As to *doubts* upon questions of law, as it is with the Jury, so it is with the Court; and we may very justly appropriate to it an emphatical scripture expression: "he that doubteth is *damned*." If a juror has one reasonable doubt as to *facts*; or if the Court have one reasonable doubt as to *law*, they would violate every sacred duty imposed upon them by God and their country; and hazard its interest, it may be, forever, if they should go on the side of injustice. And if there is a doubt, as to law or fact, justice and humanity demand, as well as every authority prescribes, that the verdict should be given in favor of the person whose life is at stake, lest innocent blood be shed.

A gentleman has observed, pretty early in this trial, that Judge Chase was not impeached on account of any opinion that he gave, but on account of his improper and intemperate proceedings and conduct. In short, it was for doing what we call upon this Court to do. Whether your honours are apprehensive of an impeachment or not, I will not say. It was for what was called his persecuting conduct, (so termed) in endeavouring to forestall justice, in order to take the life of poor *Fries*: and to prevent his chance of acquittal, that he was said to have been impeached; (in part) we do however know, that the dicision, however disagreeable it might now be held up, is taken up by the gentlemen, and supported by those in power to support this prosecution.

They say that we have called upon your honours to answer a question of fact. We deny it: we only call upon you to do what is your duty to do. You could not refuse to hear us; and therefore, it is equally your duty to decide: nay, it is your province to decide every question of law that you are called upon to decide. We call now upon you, Sir, to decide whether there was any thing done on Blannerhasset's island like an overt act of levying war? To this is added, a question of law, when we call upon you not to admit that species of evidence which is proposed by them as revelent, and legal, when it neither relates to the spot nor the person!

The gentleman asks whether it is possible for us to find a case where, in the middle of a trial, the Court has presumed to stop the evidence from being given to a Jury? Sir, we say we have heard all the revelent testimony; and, from what we can gather, they *cannot* support the indictment. It is to stop *irrelevent* testimony going to them, that our motion is made; and therefore, it is proper, even if it be in the midde of the trial, that we should stop any unnecessary proceedings; and in doing so, we do not take an atom of power from the Jury, to decide upon what they have heard; which is declared to be all that can be offered upon the indictment.

The prosecutor calls our motion a *novelty*. I must take the liberty to declare, that I never have in my whole practice, been furnished with so many novelties, as I have observed and experienced since I came into Virginia on this trial. But, if this is

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a novelty to him, it is because he has not been at the trouble to make himself acquainted with the laws of his country. He need go no farther than Hawkins's pleas, and there he might see the principles that we have laid down well established.

It was further said, that the Court had decided this question. If it was meant as a question, whether improper evidence should or should not be given; I will say that it never was decided. It must be, therefore, considered as the most extraordinary decision that ever was heard of; which I think the Court must be satisfied of, if it was meant to encourage the prosecutor to go on as he pleased. All that I think they meant was, that the prosecutor might produce all legal evidence, in such a manner as he pleased, and not that he should give whatever evidence he pleased.

That the Jury may give a verdict upon *law* and *fact*, is the sheet anchor of the gentleman's dependance. But to the length they carry it, it cuts up at once any power or judgment of the Court. I admit that the Jury have the physical powers to decide as to law and fact; but it would be going rather too far, to say, that on no occasion whatever, they shall have the right to instruct the Jury, nor give advice to them, because the Jury are not bound to mind them; and therefore they ought not to waste their breath. If this is not their principle, why do the gentlemen say, that it is all in vain to instruct the Jury, if they were not bound to find accordingly? Suppose the Jury were to find contrary to law, what would be the remedy? Why, in all civil cases the Court immediately grant a new trial: and in criminal cases, the Court can set aside the verdict. It is only where the Court give a decision favorable to the guilt of a prisoner; and where the Jury dare to differ from them, from motives of humanity, and acquit the prisoner; that acquittal stands sacred; because it is in favor of life. This has been held to be good doctrine. And there has no judge dared to grant a new trial in such a case, to bring a person twice to answer for the same crime, and hazard his life. Will the gentleman then stand up here, and tell the Jury, that they ought not to regard the Court if they speak in favor of humanity. If he does, his conduct might be approved, perhaps, at this moment, by a certain part of the community, whose minds have become highly inflamed against the prisoner: but I warn him, that, if he was so to play with life, he would find it the most unpopular of all the actings of his life; and, in a little time, he would find himself loaded with detestation. But the gentleman says, that no judge in Great Britain, has ever attempted to direct a Jury: and that if he was, he would meet the merited contempt of his country. Why, Sir, every judge has attempted it; and whenever applied to, or when the law required it, he has done it: and no irrelevent or illegal evidence is ever permitted to go to the Jury. And this has never brought the indignation of the country, or of an individual, upon any Judge. But it has and ever will bring the indignation of the people, where a judge shall go too far, in order to convict a person, when in conscience he ought to be thought innocent.

But the gentleman feels much more sensibility for the rights of Juries, and none for traitors. Sir, what does he feel for the rights of Jurors? What are their rights? Let us at once put

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an end to our Courts of Justice, and honor Juries with the entire decision. Let twelve men be impannelled, and let them, without legal aid, decide at once upon the guilt or innocence of a person! Would not this be an encroachment upon right and equity? And yet these speculative fancies must be indulged, because we call upon the Court to declare, what their *rights* and *law* give them a sacred power to declare! The law arises out of the fact. Let the fact be established to satisfy the Jury, and then what is the Law? Why, in treason, it is, that there must be two distinct witnesses to prove the overt act: then, when the Jury decide, they are to decide upon the law and the fact: but least they should not know the law upon the case, the Court are to instruct them; and then the power necessarily attached, is exerted by each.

But he feels little for the fate of traitors! No more did the intolerant and blood thirsty Jeffries: witness his numerous judgements. The man must be void of humanity, who would not drop the tear of pity, whilst he wielded the sword of justice: but Jeffries felt not. Sir, does not the gentleman know that any person may be hunted down as a traitor? He may be charged with treason out of doors, without a possibility of an atom of legal evidence being produced against him. Now, Sir, ought not such a case to excite the solicitude of every body? Do the gentlemen suppose that no man can be charged with treason who is not guilty? If he can, ought there not to be all possible solicitude shewn by the Court, and the Jury to deal out justice with mercy?

He wants to lay all the evidence before the Jury, and we want to prevent it! I admit that he does: but we conscientiously declare, that it is totally irrelevent to the case. Your honours sit in that *sacred seat* of *justice*, to prevent the wish or will of any man to be gratified, who shall attempt to trample upon, or even wish to tear up principles of law and justice. The gentleman did indeed observe, that if evidence was not pertinent to the case when offered, the Court would restrain it. Why, Sir, this is just the principle that we contend for, and nothing else.

He has told us, that when he argues on legal decisions, he is on tender ground; but when he argues on *common sense*, he can stand erect, for that can never give way: that it is only a waste of time; for if forty thousand authorities could be produced, it would be but of little consequence to him. But what are these dreadful authorities? Why they make a just decision of powers, and say, that the Court is to answer questions of law; and the Jury to decide upon questions of fact. Does any thing that we say, Sir, break down one single atom of this principle? What are Courts of Justice established for, if, in truth and reality, their legal information is to be rendered totally useless? If the Jury were to take upon them the province of the Court, and decide upon the law in opposition to it, it would be as much an incroachment as if the Court were to decide upon the facts, and give judgement in opposition to the Jury. But we ask no such thing: we want them not to go out of their province: we want them to remain in their own *independent* situation—put out

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of the way of influence from the government on the one side; and out of the way of popular fury on the other side.

In answer to Mr. Wickham, who was anticipating the danger of such doctrines upon his posterity, "Let them avoid overt acts of war, said Mr. Hay, and there is no danger." Why, Sir, I should agree with him, if innocence had never been assailed; but we know the consequences that must inevitably follow: such consequences as have existed in former times, we may justly deprecate.

The gentleman observes, that judges decided on former occasions: but, if the judges erred, he wished them rather to err an hundred times on the side of the Jury, than indulge themselves once to vindicate their own opinion. Now is this an argument, that can be grounded on common sense? Good God! What is the situation of our Courts of Justice under such a doctrine? Why then there would be a revolution, and judges would have to decide upon facts, and Juries upon law! I hope the Jury will not think that I disrespect their high character: but that they will indulge me whilst I am pleading on the part of life. Sir, I will say that if it was left to every Jury to decide upon the rule of "common sense;" one Jury would decide this way, another that way, and a third contrary to both; so that we should have no land mark for our guide, and our law would be afloat. The consequence would be, that no security would exist; that one day a man would be at liberty, and the other a victim of vengeance to some party or person.

One observation of my friend, Mr. Wirt, I cannot pass over. It is the only thing that was not answered by one of the other gentlemen. Judges, said he, are men, and mix in the politics of their country: they cannot do otherwise; for, if nothing else, their patriotism would compel them to be politicians. And as parties will run high, they cannot avoid being participants of a party spirit, in some degree. Sir, I pray the gentleman to answer me, whether Jurors do not mix as much in company, and have not as much party spirit and political bias as Judges? Will not a Jury who shall come to try a case, be as likely to bring his political ferver with him as a judge? And can the gentleman himself, even be more clothed with that sweet spirit of impartiality than his fellow citizens. Sir, he would not have the soul of a man. Nay, he would scarcely have the soul of a musquito, if he did not take part in what he considers his country's good. Then, Sir, if the gentleman is liable, Judges are liable; and consequently, Juries are liable to be influenced by what they see and hear: and of this we have had ample specimen. Now then let us see, if this inference will apply itself in the present case.

The blood thirsty Jeffries had a victim at the bar, whose blood he was determined to feast upon; and he gave such a charge to the Jury, as was calculated to command them to find him guilty. But, the Jury finding him to be actuated by the base principle of persecution, stepped between him and his blood thirsty fellows; and supported the rights of the subject, by punishing the guilty, and advocating the cause of the innocent. Reverse this picture, and suppose, that principles of justice had actuated him

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to advise the acquittal of the innocent, and the punishment of the guilty; upon true principles of law, he would have acted like an upright judge, whose advise ought to have been taken.

We may suppose possible cases, and say, that if a judge is actuated by improper motives, it is the duty of the Jury to arrest his tyrannical measures; but if a Jury are actuated by such motives, it is also the duty of the Judge to say, what is law; and if they do not proceed agreeably to law in giving the verdict, to set aside their verdict: and if a new trial is granted, all the ceremony of trial must go on again.

I must refer to the Court, with submission, to read the argument which was used by me, in the case of Judge Chase's impeachment, on the question of the rights of the Court and Juries.

In conluding, Sir, I will beg leave to say, that in whatever I have said, I have not intentionally hurt the feelings of any gentleman. We are unfortunately situated: we have to labour against strong prejudice, which, must have a strong tendency to prevent my client from having a *fair* trial. We have to combat the present state of the public mind, in favour of Col. Burr, whom I believe to he perfectly innocent of the charge exhibited against him. Sir, are we arrived at that state of society, when trial for life is to be considered a mere form; and when he who should plead in favor of a person accused, shall be held up to public odium? I trust not. I speak not with respect to any thing I have heard in Court, but of what has floated into the public ear; and must say that it requires a Jury doubly fortified to resist previous impressions.

Sirs, in cases of doubt, it is your duty to decide in favor of life, and not to let an innocent person fall a sacrifice to person or party. When all things are calm and clear, then it is easy for us to go through our duty: but it is, when difficulty occurs, and when justice is the object, that a man approaches nearest to divinity: and in no situation that I know of, is it more necessary than in one like the present.

May the God who now looks down upon us; and who placed your honours on that seat of justice, to serve and protect the innocent—may he so shape your understanding, as to know what is right; and give you that energy of soul, that you may do your duty with fortitude.

Mr. *Hay*, in addition to what he had observed to the Court, quoted Kelyng 26, to show that for a person to be an accessary before the fact, did not necessarily intend to say that he was present at the fact: nor did the indictment charge the prisoner to have been there at the time. He also quoted, 1 Hale, 686.

Mr. *Martin*, on the question of *force* quoted 2 St. Tr. 591, and Kelyng 70.—*Messenger's* case. *Green* was found to be in the party, hallooing and throwing up his hat; but he did no act. There was a special verdict, which did not find him guilty of treason, because it was found that he did no act of violence, nor did he assist any who were present that did it. This Mr. M. considered to be a solemn adjudication, to prove, that acts of violence are constituent parts of levying war.

Chief Justice. Did the special verdict find *Green* assisting with the party, and having views of their object generally?

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Mr. *Martin.* I believe not, Sir; but he was one of the assembly.

Chief Justice. It not having been found by the special verdict, that he was of the party; and his not having committed an act of violence, he might have been there by accident; and consequently, it would require some act of violence to involve him in the guilt of that transaction.

Mr. *Martin* supposed that that could not alter the point, since it clearly appeared that *something* must actually be done by the party, for judgment to be obtained against him. There must be some act of violence done, or the assembly was convened for nothing.

Mr. RANDOLPH. The little fragment of time, that is left for me, may it please your honors, I shall not abuse. The day before yesterday, I informed the Court that I had prepared myself for a full reply to all the arguments used by the other side: I forbore however, in consideration of the known talents of Mr. Martin, who has addressed you in an argument that has almost superceded the necessity of my troubling the Court. But although there is scarcely any thing omitted, yet, I shall take the liberty to address the Court, to enforce two or three things, which I have much at heart; and which, I could not justify myself to be silent upon. I do not mean to pass through the long series of cases which have been quoted, because I do not think there is much danger to be expected from them. I wish to connect our observations as much as possible, and impress them upon the Court, so that the object of our prayer might be well understood

We have been charged with designing to exclude farther testimony, and thus encroaching on the sacred right of the Jury. Sir, the Court have their rights, and the Jury have their rights, which are capable of being reconciled to the greatest harmony. They are distinct parts of the same system: but yet, although the Court has no right to dictate to the Jury, it has a right to restrain the Jury within its proper orbit. Sir, you are *brethren* in the administration of justice: you are not rivals in power. Indeed, if I were to be permitted to draw an analogy, I would say that the Court was the *father* of the judicial family—not to command them to obey, but to execute that authority, which the *law* has given it; and to that law, this Jury are bound to give obedience. Suppressing testimony, Sir!—How do we suppress testimony? How do we *attempt* to suppress any thing, but what relates to the *presence* of Mr. Burr? *You* have told them thus—"go on and relate what you think proper, except as to the point of *absence*"—There is nothing forbidden, but non-absence. And yet, Sir, have not the gentlemen seized this with an almost unparralled eagerness? Have they not attempted to colour our motives of defence, upon this single plea, with a pencil dark as *Erebus?* They have spoken in colours too plain to be mistaken. Sir, complain of this suppression of evidence! Had they not the whole field of imagination left perfectly at liberty before them; and yet, what have they done towards proving *us* guilty of treason? They have come forward, with all the majesty of rhetoric, to throw into the caldron of public opinion, already

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overwhelming with fury and contempt, the whole force which their influence has given to them against Col. Burr! And what do they say? "We cannot prompt the Jury to act, but upon principles of law and fact! They will only then permit us to approach them with this dreadful disparity; and without the intervention of the Court, to which we look for justice! Why should we be charged with asking a thing that is improper; when what we denied, is no more than the law will give us, and which no power on earth can refuse to us? We have fundamental *fact* to proceed upon: the absence of Col. Burr: and if we plead that, what outrage do we commit? If he was absent, does it not follow, of course, that he could not be charged as a principal in treason, on Blannerhasset's island? I put it upon this principle, that we ask your honor's opinion upon facts, of which there is no doubt, and which cannot be denied. This court sits, not to gratify any one man, or any body of men; nor to give amusement to the public fancy; but to do *equal justice*. If they are determined, as they say, to probe this conspiracy to the bottom, we cannot object: but is there no respect that counsel have for their character? If there be none on the other side, *we* must be permitted to put in our claim, in advocating an innocent, and accused person. What, Sir, is to be done with irrelevent testimony? Why, twenty or twenty five days, or more, is to be spent in hearing evidence, which can, in no manner, connect us with the transaction! And, (reversing the question) what are we to expect from the Court? Why, their *authority*. And, upon irrelevent testimony, we have an unquestionable right to call for it. If, indeed, as Mr. Hay, and Mr. Wirt have observed, the consequence of this interposition would promote, in any, the annihilation of the sacred rights of Jury, I would then most heartily join them, that any individual on earth ought to be sacrificed. Sir, I want not so inestimable an institution to be *touched*. Why do we want a Jury? Why, it is, that men of our feelings, of our own positions, and of our own condition, shall judge of our cases: whether criminal or civil? It is not that prosecutors shall determine our case: it is that we should have our rights. It is not that any government should banquet in blood, through the intervention of such a man, as the bloody Jeffries. No, Sir, such a man, in this country, and under our laws and Constitution, cannot obtain victims, mince his doctrines as he will. Now, let the doctrines of Judge Chase, and of the Supreme Court, be what they may, it is a phænomenon in jurisprudence, that any accused person should suffer, in order to prevent the escape of any one who may hereafter commit the crime of treason.

Sir, I am not at all surprized, that the people have been led to believe, that it is our object to smother the testimony. It has been told me by some of my friends out of doors, and I am certain, that the general opinion is so bent; but, Sir, these are idle tales. What object can we have in view; and how are we to accomplish our object? There can be no such thing, except it may refer to illegal testimony; and that we wish to suppress. What can be our object in suppressing testimony? Away then with this idea, that *we* want to suppress testimony. If we are deprived of the right we now claim, there never will be again

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found in this country a tribunal, who can sufficiently arm itself against popular clamour; or, perhaps, men cloathed with fortitude enough to support an unfortunate client against popular fury. Sir, I want no precedents; I want nothing but the virtue, and talents of our age to protect us; and whilst men, like you, fill the high seat of justice, we fear not to confide our case to you.

I do not mean to go beyond the seas for examples, but I cannot help reminding the Court of the opinion of the illustrious *Mansfield*. He stood in a situation, not unlike to this Court, at the beginning of this trial: but I believe that public prejudice has since then relented and became less. He wanted no popularity; sensible that he had to take measures that would *follow* him, and live, when he lived not. Sir, we want no authorities to prove that we do right. Our own *Washington*, a man, that will ever live in the affection of a grateful people, was once in a situation, where he might have been alarmed, with what was called, the popular voice; but he was firm to his purpose, and he wants not the historian to speak his worth. I held up a doctrine the other day, that I want the Jury, I want the audience, and all the world to be impressed with—I wish to defend an accused person from his accusers, and to support his rights, wherein, the law will hold me out. Sir, am I to be charged with murder, if the fact is established that there is no man killed? Would evidence be permitted to go on, and the time of the Court be wasted, when the man was present, and in Court? The same may be said on a charge of horse stealing, forgery, larceny, seduction of an infant, &c. Are you to sit here, when you can expect to hear nothing? What would *you* do? What the *Jury* do? What the *Counsel* do? What ought you to do, Sir? Why, if the fact of absence, or no crime is established, it must be decisively in our favor, and *sine qua non*. I take the rule to be, that wherever a radical and essential fact is established, derogatory to the proceeding, the Court can pronounce their opinion, and interpose their authority.

Again. No testimony is admissible which is not relevant, and which does not apply to the case: and how can testimony be relevant, when the absence of a person constitutes an effectual barrier to any farther examination. All the authorities which have been read, go so fully to elucidate this principle, that I take it even upon the principles of "common sense," to be settled.

But we are told, that this case ought not to be stopped, because Col. Burr was not an accessary, but a principal. This argument is increased wonderfully by Mr. M'Rae's comparing the case to an house with rooms; in one of which, one of the party committed a murder: and then alas! this house and rooms was compared to the Union, and to the several States.

The analogy was enlarged by another gentleman to a Park, and to a case of supposed murder in Richmond, when one of the party who intended to murder was not present. Now, I rather believe, that he could not be considered a principal, if he was not within "striking distance;" because he must be near enough to give his aid at the time, and spot. Sufficient theory

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has been used on this subject, to extend the construction of presence: but I must be permitted to use a little analogy too. Will a cannon carry with greater velocity, or be more sure of its mark, because it is farther off? Will a telescope, because it is more distant from a star, which it is desirable to observe, discover it more correctly? Can the powers of man increase, because of the increase of distance from the object? And yet, Sir, the talents and genius of *Col. Burr* is to have a wonderful influence, and to give a wonderful assistance, at one hundred and eighty miles distance, from Blannerhasset's island! He must have been more than man, to have done what is ascribed to him; but I cannot ascribe to him *omnipresence*: he must, as General Eaton says, have "rode on the wirlwind, and directed the storm." But this inflated imagination never can correspond with a case such as we have now before us: impossibilities in nature never can be accomplished. Is it agreeable, Sir, to rules of "common sense," that the talents of a *man*, however great he might be, shall enable him to be multitudinous! Suppose he had been at the head of the Mississippi; could he, at that moment, be supposed to be aiding and abetting at Blannerhasset's island? Where the rights of the citizens are so deeply involved, do not let us have imagination, that doubtful thing, indulged with airy flights. Let us tread in the same path which our ancestors, on the other side of the water have trod, and enjoyed for these three hundred years; and which *we* have trod for one hundred and fifty years. *Strict law*: that will do for us; give us *that*, and we shall be content: but we want not to go on the uncertain ground of *presumption*.

Another circumstance has been offered to consideration, with a view of exciting the public ear: Mr. Blannerhasset, who is already in the penitentiary, has been represented as a seduced person; and, it is represented, that his seducer is to get clear, whilst he who is seduced, might be punished as a principal! We are told that he came here, to avoid the broils and tumults of his own country; and that he had devoted himself to his laboratory and to his music; but was called from it by the seduction of Mr. Burr's stratagems. Sir, I believe Mr. Blannerhasset to be innocent: and that he may defy the utmost efforts of those who *wish* to charge him of ought: but the situation in which he is placed, does not reflect criminality upon Col. Burr. But upon this ground, Col. Burr's guilt is magnified! Sir, this argument could not have been made for you, but for those who surround this great tribunal of justice.

The Constitution and laws of England, and the American decisions have been quoted to us; and expounded by various gentlemen; but our Constitution is what I have most at heart. Mr. Hay says, that he would rather the Constitution should perish, than the rights of Juries. Sir, I reverence the Constitution, and I reverence the rights of Juries; and no man who has heard me, and reflects, but knows that it will secure to them their dearest interests and enjoyments. But the Constitution is not express upon this subject. Sir, if the Constitution is not express, are you to narrow it—are you to *conjecture* what is its meaning, and create—not new crimes in name, but new crimes

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in *substance?* Are you to introduce new crimes and persons, which the Constitution never intended? But, Sir, we are told that the Constitution has adopted terms in treason which are well known. Be it so: but what is the fact? (It is only saying to you, what is the *lèce majestus* of the nation?) It is classifying the crime, and saying, that the people would raise as one man, in defence of their country: as though something hostile was intended against the Constitution. In order to determine what were the cases that would tend to subvert the government, the legislature had to act, and provide a punishment. This shews that they never intended to adopt, or bring in a common law. In the Constitution, there are only two instances which designate *levying war;* neither of which, it is evident, could have intended *absence,* or to incorporate with it, any common law principle: and surely the legislature could not have had it in their power to speak, in contradictory terms, and say, that constructive presence should be permitted; and that accessaries must be punished as principals.

It is asked, if offenders are to slip down into the term of accessary! Should not a rule of interpretation step in to keep up the proper distinction? Sir, if reason, which teaches the fitness of things; if moral right, or if common sense shall be permitted to extend their influence on penel law, which always ought to be governed by a strict interpretation, we can have no advantage from the letter of law? It is true, that moral right, common sense, and reason, may apply in *Utopia, Oceana,* or some other visionary land or government; but wherever applied, it must be a land of blood. What is to be understood by these terms? Would not any indifferent person on earth, say it was absurd, to charge a man as present at a place, doing acts, when he was three hundred miles distant? Does not your ideas revolt at such a construction of *penal law?* The Constitution does not encourage such an idea: common law does not impose it; and shall *common sense* plunge a dagger in the heart of a man contrary to law and justice? Are *fancy* to *conjecture,* and *constructive presence,* to be omnipotent? If so, where shall we not go. By quitting this land mark, *the law,* we throw ourselves into such mazes of uncertainty, as that, at some future day, it might possibly arrive to that pitch, that a man may be convicted for treason, who never had the least idea of it. We none of us know, but we may be brought to it; since, to be denounced as a traitor, is an easy step: and since the proof to convict is as easy. It is however, contended, that this ought to be considered in the light of a common statuary crime: but, Sir, it is no such thing: the books are uniformly against it. But, say they, is there not a particular connection, by the phrases, with the common law? No, Sir, the rule of connection would not apply. If, indeed, in England, treason is called felony, it is because that is the generic description of the crime. But common law has no existence in the United States, in its application to treason: I am sure it was not conceived so, by any member of the Convention; and no one conceived, that constructive presence, would ever be attempted to be supported in any of our Courts of Judicature. Nor can I say, that it was a *casus omissus:* for I am sure, that if

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any member were to be asked, why it was not provided for in terms, he would answer, that the legislature had sufficient power, so as not to leave it to bare imagination: and then there would be the plain and literal sense of the law, left to govern the cases; by which, if it were some other crime, it could not be erected into treason. The gentleman, to guard the description they have used, have supposed it to be impossible, that it could be intended that a person should escape, who was a principal, and not present at the act. Why, Sir, I say that the legislature have the power, at any time, to prevent the escape of such an one, by enacting a law. And much rather would I, that it did, than that a Court should turn that into treason, which is not in itself treason: but, however, Mr. Hay may now lament that the projector and prime mover, as he calls Mr. Burr, must escape; it must be so, because he cannot be convicted by law.

Mr. Randolph here went into a lengthy argument respecting the charge of presence, when the person charged was absent, and one hundred and fifty miles off at the time. He also referred to the cases of the rebellions of fifteen and forty-five; but if persons were charged, he observed, there was certainly an actual rebellion, and not what was suspected would amount to one, if permitted to obtain its maturity. There might be a scheme, and it might be in agitation in a small measure; but this does not amount to the same crime, as it would if at maturity. A scheme, to be denominated a crime, cannot be considered as begun, until it is actually begun; but it was not the case here. Indeed a man could not be principal nor accessary in treason more than in murder, at one hundred and fifty miles distance: and for a very good reason, because it was not to be considered that he was near enough to render, (even upon the doctrine of *common sense,)* any immediate assistance at the spot and time. This is a very different situation from that of a sovereign, who sends an army to a distance, to undertake an expedition; because he is there represented by his generals, who were on the field of battle.

But the gentlemen, in order to get rid of this, have told us, that the indictment does not say that he was on Blannerhasset's island. But, Sir, he is charged with joining, together with others, for certain purposes therein expressed. What can be more clear in the English language, than that it was supposed that he was present? Could he have joined with others, without being present with them? Certainly no person has otherwise supposed.

As to the doctrine of the Supreme Court, which had been so much depended upon, it could have meant no other than, that, the most "remote," or "minute" transaction in the same treason, agreeably to the law, *where the person must be present*, is the act of treason: it must directly, immediately, and indissolubly, be connected with that which constitutes the treason; and must act in coincidence with the treason. That is the opinion of the Supreme Court. So great care is necessary in the administration of criminal justice, that it will not do to indulge fancy or imagination where life is at stake.

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But they suppose, that whether he be an accessary or a principal, the indictment stands right. I deny it, Sir: I contend that we have the strongest ground to say, that it cannot, in either instance, support the charge. Are we to regard British precedents? They have been quoted from *Hale*, and from *Kelyng*. 1 Hale, 238; Conyer's case, and 223. After making some remarks on these and a few other cases, Mr. Randolph referred to the eighth amendment to the Constitution, which said, that a person accused shall be "informed of the nature and cause of the accusation." Need it be asked, what is the meaning of these words? A man is charged with treason; his indictment specifies, that he was guilty of treason, by levying war at a certain place, on a certain day. What can he do but to produce testimony that he was not at that place on that day? He may be beyond sea, or perhaps on land, five hundred miles off; which he might prove. Well, he comes into Court with this confidence. But then he is told—"it is not you, Sir, that raised the army; we do not say, you were there in person; and, therefore, you need not have summoned your twenty or thirty witnesses: but recollect, that though you were not there, yet you wrote a letter, and advised the thing to be done!" He answers; "I am not prepared for trial, and therefore, ask you to continue the case." "It cannot be done; the Jury is sworn, and you must take your trial!"

Now, Sir, should it be in the power of any government, (which I am sure is not the disposition of this government,) to thus mislead, and thus entrap a person into the crime of treason? What child, who should take the Constitution into his hand, could suppose, that it would ever be so construed; and yet this is the result of the arguments used! Sir, if a person is informed of the nature and cause of his accusation, he may know how to defend himself, through this "palladium" of our liberties, against the full and capital charge.

Mr. Hay, I know, will not thank me when I say to him, "Sir, you deceive me; you try me in my ignorance of the cause; you drag me blindfold to the scaffold!" But what can I say? Give me the history of the world from the beginning to the end; the reign of the Stuarts; or whatever part of it you please; and the most direful of it will be the history of the citizens of America, under *their* doctrine: although they may be unapprized of its effects!

Are we, then, to be forced into a trial with a rope round our necks? Sir, this is substance; it is not fancy or phantom. We see our destruction at hand; and we look up to your honours as the guardians of our Constitution, and of our rights. We ask you, upon such a construction as has been given, where any government will stop its career of persecution, when it pleases to exercise it? Fate has settled it, and law will yield to it. Sirs, I feel so much raised by the idea of the effects and terrors that await the doctrine, that did I not know it came from so pure a source, and that it emanated without any great attention to the subject, I should be apt to suspect evil. I ask *you* to save this *ark* of our salvation; our liberties. I may say to you in the words of *Paul*—"believest thou these things? I know that

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thou believest." I have, for myself, not so much to fear for my children, as some others: but *there* I see a gulph open before me. No: it is not open even—it is *covered* over, and may ensnare: it may entrap! No, Sir, an *American* Judge never can indulge this doctrine. I was going to use strong language, indeed: American Judges *dare not* do so.

But Mr. Hay says, "what are we to do—can an indictment be drawn in any other form or way? Mr. Martin told him how easy it was for it to be drawn otherwise: and Mr. Hay's own good sense would tell him, that it ought to have been, that such a person or persons levied war; and such another or others, undertook the procurement of it. But no; he wanted the liberty to skip about any where to prove the overt act; but his premises are wrong: he cannot do it, because he has laid the overt act on Blannerhasset's island; and he cannot even go out of it into other parts of Wood county. Authorities will support this doctrine.

He farther says, that our eighth amendment to the Constitution, is of no use to us; because, that relates to the description of the offence, and not to the person. Sir, the *nature* of the offence is to be given to us: that is—is it *treason*, or is it a common felony—as murder, burglary? &c. This is material to our cause; because, in whatever light it might be taken, it involves the *presence* of the person charged. You cannot give an account of the transaction, without giving an account of the *actors* in that transaction. After the case is related, then he ought to describe the persons who did the act.

In my observations, I have spoken upon general principles, and that without much regard to form; because I had nothing left me but the *gleanings* of those who so ably argued the cause of my client. Sir, I want to enforce the principles of true justice: I know that your honours need not my teaching to inform you; but I want to impress the Jury, and those who surround us, with the necessity of their being watchful of their inestimable Constitution; and let every thing that is subordinate to it *perish*. This, as I before said, and always shall say, is the *ark of our salvation*. Let us, therefore, guard it with all our care and attention.

The record of conviction. These words bear a solemn weight on our side, however they may be treated on the other side. Once they treated them as an article of our fancy, but they must be inevitably a strong beam in their way to conviction. Wave that? Sir, if I could have a doubt of my understanding of the language that was used, I certainly might well doubt of the propriety of answering to this point. Do not tell us that we have been accessaries in the riot; and then say, that we have waved our right to shew it, when we *might* have done so. There is not a Court in the world, that would not excuse ignorance of facts; and shall that ignorance of facts arise from the prosecution, and then be quoted upon us, as a bar to our right? Sir, no man shall take advantage of his own error, says one of the sound maxims of the law. But, according to this doctrine, you may hide from us what it may suit your purpose to do; seize every opportunity which the stratagem will afford; and then

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say to us—you shall be sacrificed, because you could not see the time when you might have saved yourselves.

But here, in order to soften down the argument, he says, that the principle and accessary may be tried together. But how is this? Why the Jury are sent out to examine the case with respect to the *principal*, first; and, if they find him not guilty, the accessary must, of course, be acquitted.

But where is the hardship, it has been said, since the judgment might be respited? The hardness of the case! What! is a man to be *hypothetically* convicted! when he is charged directly with an offence, to which he bends his whole force, and shews that he is not guilty—he is to run the chance of being convicted at another time! First, he has done it with his own hand; and then he has acted at one hundred and fifty miles distance! This is the agreement of the *allegati* and *probati* of which the gentlemen speak.

Mr. Hay asks, whence we derived our common law? I have urged no principle whatever, that cannot be well tested by the common rules of pleading which we have adopted; or the laws of Virginia, which have incorporated in them a part of the common law; or the particular acts which we have quoted. There is where we get our common law.

But, we ought to have taken the benefit of this, before the Jury was sworn. This has been answered. How could we, before we knew what we were called to answer to?

A few words with respect to force, in addition to what has been said. I said that the crime must consist in this: the beginning, the progress to it, and the consumation of it, must exhibit something like force. A man might begin, and stop short: surely that could not be denominated the completion of the crime. If an army of men had been embodied by Col. Burr, and no attack had been made, what would the government have done? When they punish murder, they punish it because some person is dead. So with robbery, and all other species of crime. While a crime is in embrio—existing only in the intent—a man is always to have the liberty of receding; and it is, because no injury has arisen to the government, and no attempt has been made upon it. The solution of the law would otherwise be, that wherever there was a beginning of a crime, it must be punished, least it should grow up to maturity! Is this the spirit of the American Constitution and its free government! The germ of an offence! *They* may lament, that for the offence in its completion, there is no greater punishment than death! *Death, Death,* is to be the watch-word of legislation! When we shewed something of an idea of force, we said, that at least there must be *fear* imposed upon the people. That fear, it seems, was displayed at Orleans, but the storm began at Blannerhasset's island. And why was this fear generated and exhibited? Because the man who had it in his power, meant to excite it. A particular day is to be the day of attack: surround the city: spread the alarm in the coffee-houses: guard the river, for they are coming! Sir, are we to be sacrificed to an ambitious and artful man, thus, upon the mere suggestion of our intention! Henry the Fourth was sacrificed agreeable to the prediction of the Jesuits. "He

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will die," say they, "on a particular day." He was to die that day, and they were to be the actors.

Sirs, I have done. I only lament that I could not give a greater scope to my feelings on this all-important subject. I will conclude with one expression, which I am sure you will not take amiss; which applies not merely to you as Judges, but to all who fill such a sacred seat. They have passed through the temple of *Virtue*, and arrived at that of *Honour*: but they, like all other men, will find that the good will of the people will make the floor of that temple and its whole fabric splendid, and worthy of habitation. He who means to stand firm in that temple, must place his hands upon the statues of *Wisdom* and *Firmness*. These are the qualifications that can render them useful in their exalted sphere. Popular emotions, or the opinions of other men, they ought not to be shaken by; and it is against these that we look up to an American Judiciary to guard us. You are to be regardless of consequences, whilst engaged in the sacred business of Justice: *fiat justicia* will be your motto, let consequences provide for themselves.

MONDAY, August 31.

The CHIEF JUSTICE delivered the following, as the OPINION of the Court, on the motion to arrest the evidence; the debate on which motion was concluded on Saturday.

The question now to be decided, has been argued in a manner worthy of its importance; and with an earnestness, evincing the strong conviction felt by the counsel on each side, that the law is with them.

A degree of eloquence, seldom displayed on any occasion, has embellished a solidity of argument and a depth of research, by which the Court has been greatly aided in forming the opinion it is about to deliver.

The testimony adduced on the part of the United States, to prove the overt act laid in the indictment, having shewn, and the attorney for the United States having admitted, that the prisoner was not present when that act, whatever may be its character, was committed; and there being no reason to doubt but that he was at a great distance, and in a different State, it is objected to the testimony offered on the part of the United States, to connect him with those who committed the overt act, that such testimony is, irrelevant, and must, therefore, be totally rejected.

The arguments in support of this motion, respect in part, the merits of the case, as it may be supposed to stand, independent of the pleadings, and in part, as exhibited by the pleadings.

On the first division of the subject, two points are made.

1st. That conformably to the Constitution of the United States, no man can be convicted of treason, who was not present when the war was levied.

2nd. That if this construction be erroneous, no testimony can be received, to charge one man with the overt acts of others, until those overt acts, as laid in the indictment, be proved to the satisfaction of the Court.

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The question which arises on the construction of the Constitution, in every point of view in which it can be contemplated, is of infinite moment to the people of this country, and to their government; and requires the most temperate and the most deliberate consideration,

"Treason against the United States shall consist only in levying war against them."

What is the natural import of the words, "levying war? And who may be said to levy it?" Had their first application to treason been made by our Constitution, they would certainly have admitted of some latitude of construction. Taken most literally, they are perhaps of the same import with the words raising or creating war; but as those who join after the commencement, are equally the objects of punishment, there would probably be a general admission, that the term also comprehended making war, or carrying on war. In the construction which Courts would be required to give the words, it is not improbable that those who should raise, create, make, or carry on war, might be comprehended. The various acts which would be considered as coming within the term, would be settled by a course of decisions, and would be affirming boldly to say, that those only who actually constituted a portion of the military force appearing in arms, could be considered as levying war. There is no difficulty in affirming, that there must be a war, or the crime of levying it cannot exist: but there would often be considerable difficulty in affirming, that a particular act did, or did not, involve the person committing it, in the guilt and in the fact of levying war. If, for example, an army should be actually raised, for the avowed purpose of carrying on open war against the United States, and subverting their government; the point must be weighed very deliberately, before a Judge would venture to decide, that an overt act of levying war had not been committed by a commissary of purchases, who never saw the army, but who, knowing its object, and leaguing himself with the rebels, supplied that army with provisions; or by a recruiting officer holding a commission in the rebel service: who, though never in a camp, executed the particular duty assigned to him.

But the term is not for the first time applied to treason, by the Constitution of the United States. It is a technical term It is used in a very old statute of that country, whose language is our language; and whose laws form the substratum of our laws. It is scarcely conceivable, that the term was not employed by the framers of our Constitution, in the same sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed, must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is therefore reasonable to suppose, unless it be incompatible with other expressions of the Constitution, that the term, "levying war," is used in that instrument, in the same sense in which it was understood in England, and in this country, to have been used in the statute of the 25th of Edward 3d, from which it was borrowed.

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It is said that this meaning is to be collected only from adjudged cases. But this position cannot be conceded to the extent to which it is laid down. The superior authority of adjudged cases will never be controverted. But those celebrated elementary writers, who have stated the principles of the law; whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected. These books are in the hands of every student. Legal opinions are formed upon them, and those opinions are afterwards carried to the bar, the bench, and the legislature. In the exposition of terms, therefore, used in instruments of the present day, the definitions and the dicta of those authors, if not contradicted by adjudications, and if compatible with the words of the statute, are entitled to respect. It is to be regretted, that they do not shed as much light on this part of the subject as is to be wished.

Coke does not give a complete definition of the term, but puts cases which amount to levying war. "An actual rebellion or insurrection, he says, is a levying of war." In whom?—Coke does not say whether in those only who appear in arms, or in all those who take part in the rebellion, or insurrection by real open deed.

Hale, in treating on the same subject, puts many cases which shall constitute a levying of war; without which, no act can amount to treason: but he does not particularize the parts to be performed by the different persons concerned in that war, which shall be sufficient to fix on each, the guilt of levying it.

Foster says "the joining with rebels in an act of rebellion, or with enemies in acts of hostility, will make a man a traitor." "Furnishing rebels or enemies with money, arms, ammunition, or other necessaries, will *prima facie* make a man a traitor."

Foster does not say that he would be a traitor, under the words of the statute, independent of the legal rule which attaches the guilt of the principal to an accessary; nor that his treason is occasioned by that rule. In England this discrimination need not be made, except for the purpose of framing the indictment; and therefore, in the English books, we do not perceive any effort to make it. Thus surrendering a castle to rebels, being in confederacy with them, is said by Hale and Foster to be treason, under the clause of levying war: but whether it be levying war in fact, or aiding those who levy it, is not said. Upon this point, Blackstone is not more satisfactory. Although, we may find among the commentators upon treason, enough to satisfy the enquiry; what is a state of internal war? Yet no precise information can be acquired from them, which would enable us to decide with clearness, whether persons not in arms, but taking part in a rebellion, could be said to levy war, independent of that doctrince, which attaches to the accessary the guilt of his principal.

If, in adjudged cases, this question has been taken up and directly decided, the Court has not seen those cases. The argument which may be drawn, from the form of the indictment, though strong, is not conclusive. In the precedent found in

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Tremaine, Mary Speake, who was indicted for furnishing provisions to the party of the Duke of Monmouth, is indicted for furnishing provisions to those who were levying war; not for levying war herself. It may correctly be argued, that had this act amounted to levying war, she would have been indicted for levying war; and the furnishing of provisions, would have been laid as the overt act. The Court felt this, when the precedant was produced. But the argument, though strong, is not conclusive; because in England, the enquiry whether she had become a traitor by levying war, or by giving aid and comfort to those who were levying war, was important; and because too, it does not appear from the indictment, that she was actually concerned in the rebellion, that she belonged to the rebel party, or was guilty of any thing further than a criminal speculation in selling them provisions.

It is not deemed necessary to trace the doctrine, that in treason, all are principals to its source. Its origin is most probably stated correctly by Judge Tucker, in a work, the merit of which is with pleasure acknowledged. But if a spurious doctrine has been introduced into the common law, and has for centuries been admitted as genuine, it would require great hardihood in a Judge to reject it. Accordingly, we find those of the English Jurists, who seem to disapprove the principle, declaring that it is now too firmly settled to be shaken.

It is unnecessary to trace this doctrine to its source, for another reason. The terms of the Constitution comprize no question, respecting principal and accessary, so far as either may be truly and in fact said to levy war. Whether in England, a person would be indicted in express terms for levying war, or for assisting others in levying war; yet if in correct and legal language he can be said to have levied war; and if it has never been decided that the act would not amount to levying war; his case may, without violent construction, be brought within the letter, and the plain meaning of the Constitution.

In examining these words, the argument which may be drawn from felonies, as for example, from murder, is not more conclusive. Murder is the single act of killing with malice aforethought. But war is a complex operation, composed of many parts, co-operating with each other. No one man or body of men, can perform them all, if the war be of any continuance Although, then in correct and in law language, he alone is said to have murdered another who has perpetrated the fact of killing, or has been been present aiding that fact; it does not follow that he alone can have levied war, who has borne arms. All those who perform the various and essential military parts, of prosecuting the war, which must be assigned to different persons, may with correctness and accuracy, be said to levy war.

Taking this view of the subject, it appears to the Court, that those who perform a part in the prosecution of the war, may correctly be said to levy war, and to commit treason under the Constitution. It will be observed, that this opinion does not extend to the case of a person who performs no act in the prosecution of the war, who counsels and advises it, or who being engaged in the conspiracy, fails to perform his part. Whether

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such persons may be implicated by the doctrine, that whatever would make a man an accessary in felony, makes him a principal in treason, or are excluded, because that doctrine is inapplicable to the United States; the Constitution having declared, that treason shall consist only in levying war, and having made the proof of *overt acts* necessary to conviction, is a question of vast importance, which it would be proper for the Supreme Court to take a fit occasion to decide; but which an inferior tribunal would not willingly determine, unless the case before them should require it.

It may now be proper to notice the opinion of the Supreme Court, in the case of the United States, against Bollman and Swartwout. It is said, that this opinion, in declaring that those who do not bear arms, may yet be guilty of treason, is contrary to law, and is not obligatory, because it is extra-judicial, and was delivered on a point not argued. This Court is therefore, required to depart from the principle there laid down.

It is true, that in that case, after forming the opinion that no treason could be committed, because no treasonable assemblage had taken place; the Court might have dispensed with proceeding further in the doctrines of treason. But, it is to be remembered, that the judges might act separately, and perhaps at the same time, on the various prosecutions, which might be instituted, and that no appeal lay from their decisions. Opposite judgments on the point, would have presented a state of things infinitely to be deplored by all. It was not surprising then, that they should have made some attempt to settle principles, which would probably occur, and which were in some degree connected with the point before them.

The Court had employed some reasoning, to shew, that without the actual embodying of men, war could not be levied. It might have been inferred from this, that those only who were so embodied, could be guilty of treason. Not only to exclude this inference, but also to affirm the contrary, the Court proceeded to observe. "It is not the intention of the Court to say, that no individual can be guilty of this crime, who has not appeared in arms against his country. On the contrary, if war be actually levied; that is, if a body of men be actually assembled, for the purpose of effecting by force, a treasonable object; all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."

This Court is told, that if this opinion be incorrect, it ought not to be obeyed; because it was extra-judicial. For myself, I can say, that I could not lightly be prevailed on to disobey it; were I even convinced that it was erroneous; but I would certainly use any means which the law placed in my power to carry the question again before the Supreme Court, for re-consideration, in a case, in which it would directly occur, and be fully argued.

The Court which gave this opinion, was composed of four Judges. At the time, I thought them unanimous; but I have since had reason to suspect, that one of them, whose opinion is entitled to great respect, and whose indisposition prevented his

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entering into the discussions, on some of those points which were not essential to the decision of the very case, under consideration, did not concur in this particular point, with his brethren. Had the opinion been unanimous, it would have been given by a majority of the judges. But should the three, who were absent, concur with that Judge who was present, and who perhaps dissents from what was then the opinion of the Court, a majority of the Judges may overrule this decision. I should, therefore, feel no objection, although I then thought, and still think, the opinion perfectly correct, to carry the point if possible, again before the Supreme Court, if the case should depend upon it.

In saying that I still think the opinion perfectly correct, I do not consider myself as going further than the preceding reasoning goes. Some gentlemen have argued, as if the Supreme Court had adopted the whole doctrine of English books, on the subject of accessaries to treason. But certainly such is not the fact. Those only who perform a part, and who are leagued in the conspiracy, are declared to be traitors. To complete the definition, both circumstances must concur. They must "perform a part," which will furnish the overt act, and they must be "leagued in the conspiracy." The person who comes within this description, in the opinion of the Court, levies war. The present motion, however, does not rest upon this point; for, if under this indictment the United States might be let in, to prove the part performed by the prisoner, if he did perform any part, the Court could not stop the testimony in its present stage.

2nd. The second point involves the character of the overt act, which has been given in evidence, and calls upon the Court to declare whether that act can amount to levying war. Although the Court ought now to avoid any analysis of the testimony, which has been offered in this case; provided the decision of the motion should not rest upon it: yet many reasons concur in giving peculiar propriety to a delivery, in the course of these trials, of a detailed opinion on the question, what is levying war? As this question has been argued at great length, it may, probably, save much trouble to the Counsel, now to give that opinion.

In opening the case, it was contended by the Attorney for the United States, and has since been maintained on the part of the prosecution, that neither arms nor the application of force or violence, are indispensably necessary, to constitute the fact of levying war. To illustrate these positions, several cases have been stated, many of which would clearly amount to treason. In all of them, except that which was probably intended to be this case, and on which, no observation will be made; the object of the assemblage was clearly treasonable: its character was unequivocal, and was demonstrated by evidence furnished by the assemblage itself; there was no necessity to reply upon information, drawn from extrinsic sources, or in order to understand the fact, to pursue a course of intricate reasoning, and to conjecture motives. A force is supposed to be collected for an avowed treasonable object; in a condition to attempt that object, and to have commenced the attempt by moving towards it. I state these particulars, because, although the cases put may

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establish the doctrine they are intended to support, may prove that the absence of arms, or the failure to apply force to sensible objects, by the actual commission of violence on those objects, may be supplied by other circumstances; yet, they also serve to show, that the mind requires those circumstances, to be satisfied that war is levied.

Their construction of the opinion of the Supreme Court is, I think, thus far correct. It is certainly the opinion which was at the time entertained by myself, and which is still entertained. If a rebel army avowing its hostility to the sovereign power, should front that of the government; should march and countermarch before it; should manœuvre in its face; and should then disperse from any cause whatever, without firing a gun, I confess, I could not without some surprise, hear gentlemen seriously contend, that this could not amount to an act of levying war. A case equally strong, may be put with respect to the absence of military weapons. If the party be in a condition to execute the purposed treason, without the usual implements of war, I can perceive no reason for requiring those implements in order to constitute the crime.

It is argued, that no adjudged case can be produced from the English books, where actual violence has not been committed. Suppose this were true. No adjudged case has, or it is believed, can be produced, from those books, in which it has been laid down, that war cannot be levied without the actual application of violence to external objects. The silence of the reporters on this point, may be readily accounted for. In cases of actual rebellion against the government, the most active influential leaders are generally most actively engaged in the war; and as the object can never be to extend punishment to extermination, a sufficient number are found among those who have committed actual hostilities, to satisfy the avenging arm of justice. In cases of constructive treason, such as pulling down meeting houses, where the direct and avowed object is not the destruction of the sovereign power; some acts of violence might be generally required, to give to the crime a sufficient degree of malignity to convert it into treason, to render the guilt of any individual unequivocal.

But Vaughan's case, is a case where there was no real application of violence, and where the act was adjudged to be treason. Gentlemen argue, that Vaughan was only guilty of adhering to the king's enemies; but they have not the authority of the Court for so saying. The judges unquestionably treat the cruizing of Vaughan as an overt act of levying war.

The opinions of the best elementary writers concur in declaring, that where a body of men are assembled for the purpose of making war against the government, and are in a condition to make that war, the assemblage is an act of levying war. These opinions are contradicted by no adjudged case, and are supported by Vaughan's case. This Court is not inclined to controvert them.

But, although, in this respect, the opinion of the Supreme Court has not been misunderstood on the part of the prosecution, that opinion seems not to have been fully adverted to in a very

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essential point in which it is said to have been misconceived by others.

The opinion I am informed, has been construed to mean, that any assemblage whatever, for a treasonable purpose, whether in force, or not in force, whether in a condition to use violence or not in that condition, is a levying of war. It is this construction, which has not indeed been expressly advanced at the bar, but, which is said, to have been adopted elsewhere, that the Court deems it necessary to examine.

Independent of authority, trusting only to the dictates of reason, and expounding terms according to their ordinary signification, we should probably all concur in the declaration, that war should not be levied without the employment or exhibition of force. War is an appeal from reason to the sword, and he who makes the appeal evidences the fact by the use of the means. His intention to go to war, may be proved by words; but the actual going to war a fact which is to be proved by open deed. The end is to be effected by force, and it would seem, that in cases where no declaration is to be made, the state of actual war could only be created by the employment of force, or being in a condition to employ it.

But the term having been adopted by our Constitution, must be understood in that sense in which it was universally received in this country, when the Constitution was framed. The sense in which it was received, is to be collected from the most approved authorities of that nation, from which we have borrowed the term.

Lord Coke says, that levying war against the king, was treason at the common law. "A compassing of conspiracy to levy war, he adds, is no treason; for there must be a levying of war in fact." He proceeds to state cases of constructive levying war, where the direct design is not to overturn the government, but to effect some general object by force. The terms he employs in stating these cases, are such, as indicate an impression on his mind, that actual violence is a necessary ingredient in constituting the fact of levying war. He then proceeds to say, "an actual rebellion or insurrection is a levying of war within this act." "If any, with strength and weapons invasive and defensive, doth hold and defend a castle or fort, against the king and his power, this is levying of war against the king." These cases are but to illustrate what he denominates, "a war in fact." It is not easy to conceive "an actual invasion or insurrection" unconnected with force; nor can "a castle or fort be defended with strength and weapons invasive and defensive" without the employment of actual force. It would seem then to have been the opinion of Lord Coke, that to levy war, there must be an assemblage of men, in a condition, and with an intention to employ force. He certainly puts no case of a different description.

Lord Hale says (149, 6) "what shall be said of levying war, is partly a question of fact, for it is not every unlawful or riotous assembly of many persons to do an unlawful act, though *de facto* they commit the act they intend, that makes a levying of war; for then every riot would be treason, &c." "but it must be such an assembly as carries with it *speciem belli*, the appearance

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of war, as if they ride or march *vexillis explicatis*, with colours flying, or if they be formed into companies or furnished with military officers, or if they are armed with military weapons: as swords, guns, bills, halberds, pikes, and are so circumstanced, that it may be reasonably concluded they are in a posture of war, which circumstances are so various, that it is hard to describe them all particularly."

"Only the general expressions in all the indictments of this nature that I have seen, are, '*more guerrino arraiati*,' arrayed in warlike manner."

He afterwards adds, "If there be a war levied as is above declared, viz. an assembly arrayed in warlike manner, and so in the posture of war for any treasonable attempt, it is *bellum levatum*, but not *percussum*."

It is obvious, that Lord Hale supposed an assemblage of men in force, in a military posture, to be necessary to constitute the fact of levying war. The idea he appears to suggest, that the apparatus of war is necessary, has been very justly combated by an able Judge, who has written a valuable treatise on the subject of treason; but it is not recollected that his position, that the assembly should be in posture of war for any treasonable attempt, has ever been denied.—Hawk. ch. 17, sec. 23, says, "That not only those who rebel against the king, and take up arms to dethrone him, but also in many other cases, those who in a violent and forcible manner withstand his lawful authority, are said to levy war against him; and therefore, those who hold a fort or castle against the king's forces, or keep together armed numbers of men against the king's express command, have been adjudged to levy war against him."

The cases put by Hawkins, are all cases of actual force and violence, "Those who rebel against the king, and take up arms to dethrone him," in many other cases those "who in a violent and forcible manner withstand his lawful authority." "Those that hold a fort or castle against his forces, or keep together armed numbers of men against his express command." These cases are obviously cases of force and violence.

Hawkins next proceeds to describe cases, in which war is understood to be levied under the statute, although, it was not directly made against the government. This Lord Hale terms, an interpretatiœ, or constructive levying of war; and, it will be perceived, that he puts no case, in which actual force is dispensed with.

"Those also, he says, who make an insurrection, in order to redress a public grievance, whether it be a real or pretended one, and of their own authority attempt *with force* to redress it, are said to levy war against the king, although they have no direct design against his person; inasmuch as they insolently invade his prerogative, by attempting to do that by private authority, which he by public justice ought to do; which manifestly tends to a downright rebellion. As where great numbers *by force* attempt to remove certain persons from the king, &c." The cases here put, by Hawkins, of a constructive levying of war, do in terms require force, as a constituent part of the description of the offence.

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Judge Foster, in his valuable treatise on treason, states the opinion which has been quoted from Lord Hale, and differs from that writer so far as the latter might seem to require swords, drums, colours, &c. what he terms the pomp and pageantry of war; as essential circumstances to constitute the fact of levying war. In the case of Damaree and Purchase, he says, "the want of those circumstances weighed nothing with the Court, although the prisoner's counsel insisted much on that matter." But, he adds, "the number of the insurgents supplied the want of military weapons: and they were provided with axes, crows, and tools of the like nature, proper for the mischief they intended to effect. *Furor arma ministrat.*"

It is apparent, that Judge Foster here alludes to an assemblage in force; or, as Lord Hale terms it, "in a warlike posture:" that is, in a condition to attempt, or proceed upon, the treason which had been contemplated. The same author afterwards states at large, the case of Damaree and Purchase, from 8th State Trials, and they are cases where the insurgents not only assembled in force, in the posture of war, or in a condition to execute the treasonable design; but they did actually carry it into execution, and did resist the guards who were sent to disperse them.

Judge Foster states, sec. 4, all insurrections to effect certain innovations of a public and general concern, *by an armed force*, to be in construction of law, high treason within the clause of levying war.

The cases put by Foster of constructive levying war, all contain as a material ingredient, the actual employment of force. After going through this branch of his subject, he proceeds to state the law, in a case of actual levying war: that is, where the war is intended directly against the government.

He says, sec. 9, "An assembly armed and arrayed in a warlike manner, for a treasonable purpose, is *bellum levatum*, though not *bellum percussum*. Listing and marching are sufficient overt acts, without coming to a battle or action. So is cruising on the king's subjects, under a French commission; France being then at war with us, was held to be adhering to the king's enemies, though no other act of hostility be proved."

"An assembly, armed and arrayed in a warlike manner, for any treasonable purpose," is certainly in a state of force; in a condition to execute the treason for which they assembled. The words, "enlisting and marching," which are overt acts of levying war, do, in the arrangement of the sentence, also imply a state of force, though that state is not expressed in terms, for the succeeding words, which state a particular event as not having happened, prove that event to have been the next circumstance to those which had happened—they are "without coming to a battle or action." "If men be enlisted and march," (that is, if they march prepared for battle, or in a condition for action; for marching is a technical term applied to the movement of a military corps,) it is an overt act of levying war, though they do not come to a battle or action. This exposition is rendered the stronger, by what seems to be put in the same sentence, as a parrallel case, with respect to adhering to an enemy. It is cruizing under a commission from an enemy, without committing any other act of

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hostility. Cruizing is the act of sailing in warlike form, and in a condition to assail those of whom the cruizer is in quest.

This exposition, which seems to be that intended by Judge Foster, is rendered the more certain, by a reference to the case in the State Trials from which the extracts are taken. The words used by the Chief Justice are, "when men form themselves into a body, and march rank and file, with weapons offensive and defensive; this is levying war with open force, if the design be public." Mr. Phipps, the counsel for the prisoner, afterwards observed, "intending to levy war is not treason, unless a war be actually levied." To this the Chief Justice answered, "Is it not actually levying of war, if they actually provide arms, and levy men, and in a warlike manner set out and cruize and come with a design to destroy our ships?" Mr. Phipps still insisted "It would not be an actual levying of war unless they committed some act of hostility." "Yes, indeed, said the Chief Justice, the going on board and being in a posture to attack the king's ships." Mr. Baron Powis added, "but for you to say, that because they did not actually fight, it is not a levying of war; is it not plain what they did intend? That they came with that intention, that they came armed, and had guns and blunderbusses, and surrounded the ship twice; they came with an armed force; that is a strong evidence of the design."

The point insisted on by counsel in the case of Vaughan, as in this case, was, that war could not be levied without actual fighting. In this the counsel was very properly overruled: but it is apparent, that the Judges proceeded entirely on the idea, that a warlike posture was indispensable to the fact of levying war.

Judge Foster proceeds to give other instances of levying war. "Attacking the king's forces in opposition to his authority, upon a march, or in quarters, is levying war." "Holding a castle or fort against the king or his forces, if *actual force be used in order to keep possession*, is levying war. But a bare detainer; as, suppose by shutting the gates against the king or his forces, without any other force from within, Lord Hale conceiveth, will not amount to treason."

The whole doctrine of Judge Foster, on this subject, seems to demonstrate a clear opinion, that a state of force and violence; a posture of war must exist, to constitute technically, as well as really, the fact of levying war."

Judge Blackstone seems to concur with his predecessors. Speaking of levying war, he says, "This may be done, by taking arms not only to dethrone the king, but under pretence to reform religion, or the laws; or to remove evil counsellors; or other grievances, whether real or pretended. For the law does not, neither can it, permit any private man, or set of men, to interfere *forcibly* in matters of such high importance."

He proceeds to give examples of levying war, which show, that he contemplated actual force as a necessary ingredient in the composition of this crime.

It would seem then, from the English authorities, that the words, "levying war," have not received a technical different from their natural meaning, so far as respects the character of

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the assemblage of men which may constitute the fact. It must be a warlike assemblage, carrying the appearance of force, and in a situation to practice hostility.

Several Judges of the United States have given opinions at their circuits, on this subject; all of which deserve and will receive the particular attention of this Court.

In his charge to the Grand Jury, when John Fries was indicted, in consequence of a forcible opposition to the direct tax, Judge Iredell is understood to have said, "I think I am warranted in saying, that if, in the case of the insurgents who may come under your consideration, the intention was to prevent by force of arms, the execution of any act of the Congress of the United States altogether, any *forcible opposition* calculated to carry that intention into effect, was a levying of war against the United States, and of course an act of treason." To levy war then, according to this opinion of Judge Iredell, required the actual exertion of force.

Judge Patterson, in his opinion delivered in two different cases, seems not to differ from Judge Iredell. He does not, indeed, precisely state the employment of force as necessary to constitute the levying of war: but in giving his opinion in cases where force was actually employed, he considers the crime in one case as dependent on the intention; and in the other case he says, "combining these facts and this design," (that is, combining actual force with a treasonable design,) "the crime is high treason."

Judge Peters has also indicated the opinion that force was necessary to constitute the crime of levying war.

Judge Chase has been particularly clear and explicit. In an opinion which he appears to have prepared on great consideration, he says, "the Court are of opinion, that if a body of people conspire and meditate an insurrection to resist or oppose the execution of a statute of the United States by force, that they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war; and the quantum of the force employed, neither increases nor diminishes the crime; whether by one hundred or one thousand persons, is wholly immaterial.

"The Court are of opinion, that a combination or conspiracy to levy war against the United States, is not treason, unless combined with an attempt to carry such combination or conspiracy into execution, some actual force or violence must be used in pursuance of such design to levy war: but that it is altogether immaterial, whether the force used be sufficient to effectuate the object. Any force, connected with the intention, will constitute the crime of levying of war."

In various parts of the opinion delivered by Judge Chase, in the case of Fries, the same sentiments are to be found. It is to be observed, that these Judges are not content that troops should be assembled in a condition to employ force. According to them some degree of force must have been actually employed.

The Judges of the United States, then, so far as their opinions have been quoted, seem to have required still more to constitute the fact of levying war, than has been required by the English

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books. Our Judges seem to have required the actual exercise of force; the actual employment of some degree of violence. This, however, may be, and probably is, because in the cases in which their opinions were given, the design not having been to overturn the government, but to resist the execution of a law; such an assemblage would be sufficient for the purpose, as to require the actual employment of force to render the object unequivocal.

But it is said, all these authorities have been overruled by the decision of the Supreme Court, in the case of the United States against Swartwout and Bollman.

If the Supreme Court have indeed extended the doctrine of treason, further than it has heretofore been carried by the Judges of England, or of this country, their decision would be submitted to. At least this Court could go no further than to endeavour again to bring the point directly before them. It would, however, be expected, that an opinion which is to overrule all former precedents, and to establish a principal never before recognized, should be expressed in plain and explicit terms. A mere implication, ought not to prostrate a principle which seems to have been so well established. Had the intention been entertained to make so material a change in this respect, the Court ought to have expressly declared, that any assemblage of men whatever, who had formed a treasonable design, whether in force or not; whether in a condition to attempt the design or not; whether attended with warlike appearances or not; constitutes the fact of levying war. Yet no declaration to this amount is made. Not an expression of the kind is to be found in the opinion of the Supreme Court. The foundation on which this argument rests, is the omission of the Court to state, that the assemblage which constitutes the fact of levying war ought to be in force; and some passages, which shew, that the question respecting the nature of the assemblage, was not in the mind of the Court when the opinion was drawn, which passages are mingled with others, which at least show that there was no intention to depart from the course of the precedents in cases of treason, by levying war.

Every opinion to be correctly understood, ought to be considered with a view to the case in which it was delivered. In the case of the United States against Bollman and Swartwout, there was no evidence, that even two men had ever met for the purpose of executing the plan, in which those persons were charged with having participated. It was, therefore, sufficient for the Court to say, that unless men were assembled, war could not be levied. That case was decided by this declaration. The Court might, indeed, have defined the species of assemblage which would amount to levying of war; but as this opinion was not a treatise on treason, but a decision of a particular case, expressions of doubtful import should be construed in reference to the case itself; and the mere omission to state, that a particular circumstance was necessary to the consummation of the crime, ought not to be construed into a declaration that the circumstance was unimportant. General expressions ought not to be considered as overruling settled principles, without a direct de-

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claration to that effect. After these preliminary observations the Court will proceed to examine the opinion which has occasioned them.

The first expression in it bearing on the present question, is, "To constitute that specific crime for which the prisoner now before the Court has been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert, by force, the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed."

Although it is not expressly stated, that the assemblage of men, for the purpose of carrying into operation the treasonable intent, which will amount to levying war, must be an assemblage in force; yet it is fairly to be inferred from the context; and nothing like dispensing with force appears in this paragraph. The expressions are, "to constitute the crime, war must be levied." A conspiracy to levy war is spoken of, as "a conspiracy to subvert, by force, the government of our country." Speaking in general terms of an assemblage of men for this, or for any other purpose, a person would naturally be understood as speaking of an assemblage in some degree adapted to the purpose. An assemblage to subvert, by force, the government of our country, and amounting to a levying of war, should be an assemblage in force.

In a subsequent paragraph, the Court says, "It is not the intention of the Court to say, that no individual can be guilty of this crime, who has not appeared in arms against his country. On the contrary, if war be actually levied; that is, if a body of men be actually assembled, in order to effect, by force, a treasonable purpose; all those who perform any part, however minute, &c. and who are actually leagued in the general conspiracy, are traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war."

The observations made on the preceding paragraph apply to this. "A body of men actually assembled, in order to effect, by force, a treasonable purpose," must be a body assembled with such appearance of force as would warrant the opinion, that they were assembled for the particular purpose; an assemblage to constitute an actual levying of war, should be an assemblage with such an appearance of force as would justify the opinion, that they met for the purpose.

This explanation, which is believed to be the natural, certainly not a strained explanation of the words, derives some additional aid from the terms in which the paragraph last quoted commences. "It is not the intention of the Court to say, that no individual can be guilty of treason, who has not appeared in arms against his country." These words seem to obviate an inference which might otherwise have been drawn from the preceding paragraph. They indicate, that in the mind of the Court, the assemblage stated in that paragraph was an assemblage in arms. That the individuals who composed it, had appeared in arms against their

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country. That is, in other words, that the assemblage was a military, a warlike assemblage.

The succeeding paragraph, in the opinion, relates to a conspiracy; and serves to shew that force and violence were in the mind of the Court; and that there was no idea of extending the crime of treason, by construction, beyond the constitutional definition, which had been given of it.

Returning to the case actually before the Court, it is said, "a design to overturn the government of the United States in New Orleans, *by force*, would have been unquestionably a design, which, if carried into execution, would have been treason: and the assemblage of a body of men, for the purpose of carrying it into execution, would amount to levying war against the United States."

Now what could reasonably be said to be an assemblage of a body of men for the purpose of overturning the government of the United States in New Orleans, by force? Certainly an assemblage in force; an assemblage prepared and intending to act with force: a military assemblage. The decisions, therefore, made by the Judges of the United States, are then declared to be in conformity with the principles laid down by the Supreme Court. Is this declaration compatible with the idea of departing from those opinions on a point within the contemplation of the Court? The opinions of Judge Patterson and Judge Iredell are said "to imply an actual assemblage of men; though they rather designed to remark on the purpose to which the force was to be applied, than on the nature of the force itself." This observation certainly indicates, that the necessity of an assemblage of men, was the particular point the Court meant to establish; and, that the idea of force was never separated from this assemblage.

The opinion of Judge Chase is next quoted with approbation. This opinion in terms requires the employment of force.

After stating the verbal communications said to have been made by Mr. Swartwout to Gen. Wilkinson, the Court says, "if these words import, that the government of New Orleans was to be revolutionized by force, although merely as a step to, or a mean of exciting some greater projects, the design was unquestionably treasonable; and any assemblage of men for that purpose would amount to a levying of war.

The words, "any assemblage of men," if construed to affirm, that any two or three of the conspirators who might be found together, after this plan had been formed, would be the act of levying war, would certainly be misconstrued. The sense of the expressions, "any assemblage of men," is restricted by the words "for this purpose." Now, could it be in the contemplation of the Court, that a body of men would assemble for the purpose of revolutionizing New Orleans, by force, who should not themselves be in force?

After noticing some difference of opinion among the Judges, respecting the import of the words said to have been used by Mr. Swartwout, the Court proceeds to observe: "But whether this treasonable intention be really imputable to the plan or not; it is admitted, that it must have been carried into execution by an

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open assemblage for that purpose, previous to the arrest of the prisoner, in order to consummate the crime as to him."

Could the Court have conceived "an open assemblage," for the purpose of overturning the government of New Orleans by force," to be only equivalent to a secret fugitive assemblage, without the appearance of force?

After quoting the words of Mr. Swartwout, from the affidavit, in which it was stated, that Mr. Burr was levying an army of seven thousand men; and observing, that the treason to be inferred from these words, would depend on the intention with which it was levied, and on the progress which had been made in levying it, the Court say, "the question then is, whether this evidence proves Col. Burr to have advanced so far in levying an army, as actually to have assembled them."

Actually to assemble an army of seven thousand men is unquestionably to place those who are so assembled, in a state of open force.

But as the mode of expression used in this passage might be misconstrued, so far as to countenance the opinion, that it would be necessary to assemble the whole army, in order to constitute the fact of levying war, the Court proceeds to say, "It is argued that since it cannot be necessary that the whole seven thousand men should be assembled, their commencing their march by detachments, to the place of rendezvous, must be sufficient to constitute the crime."

"This position is correct with some qualification. It cannot be necessary that the whole army should assemble, and that the various parts which are to compose it, should have combined. But it is necessary there should be an actual assemblage; and therefore this evidence should make the fact unequivocal.

"The travelling of individuals to the place of rendezvous, would perhaps, not be sufficient. This would be an equivocal act, and has no warlike appearance. The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage."

The position here stated by the Counsel for the prosecution, is, that the army "commencing its march by detachments to the place of rendezvous, (that is of the army,) must be sufficient to constitute the crime."

This position is not admitted by the Court to be universally correct. It is said to be "correct with some qualification." What is that qualification?

"The travelling of individuals to the place of rendezvous," (and by this term is not to be understood one individual by himself, but several individuals either separately or together, but not in military form,) "would perhaps not be sufficient." Why not sufficient? Because, says the Court, "this would be an equivocal act, and has no warlike appearance." The act then should be unequivocal, and should have a warlike appearance. It must exhibit in the words of Sir Matthew Hale, *speciem belli*, the appearance of war. This construction is rendered in some measure necessary, when we observe that the Court is qualifying the position. "That the army commencing their march by detachments to the place of rendezvous, must be sufficient to con-

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stitute the crime." In qualifying this position, they say, "the travelling of individuals, would perhaps not be sufficient." Now, a solitary individual travelling to any point, with any intent, could not, without a total disregard of language, be termed a marching detachment. The Court, therefore, must have contemplated several individuals travelling together; and the words being used in reference to the position they were intended to qualify, would seem to indicate the distinction between the appearances, attending the usual movement of a company of men for civil purposes, and that military movement which might in correct language, be denominated "marching by detachments."

The Court then proceeded to say, "the meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage."

It is obvious from the context, that the Court must have intended to state a case which would in itself be unequivocal; because it would have a warlike appearance. The case stated, is, that of distinct bodies of men, assembling at different places, and marching from these places of partial to a place of general rendezvous. When this has been done, an assemblage is produced, which would in itself be unequivocal. But when is it done? What is the assemblage here described? The assemblage formed of the different bodies of partial, at a place of general rendezvous. In describing the mode of coming to this assemblage, the civil term "travelling," is dropped, and the military term, "marching" is employed. If this was intended as a definition of an assemblage which would amount to levying war, the definition requires an assemblage at a place of general rendezvous, composed of bodies of men, who had previously assembled at places of partial rendezvous. But this is not intended as a definition: for clearly if there should be no places of partial rendezvous; if troops should embody in the first instance, in great force, for the purpose of subverting the government by violence, the act would be unequivocal; it would have a warlike appearance, and it would, according to the opinion of the Supreme Court, properly construed, and according to the English authorities, amount to levying war. But this, though not a definition, is put as an example; and surely it may be safely taken as an example. If different bodies of men, in pursuance of a treasonable design, plainly proved, should assemble in warlike appearance, at places of partial rendezvous, and should *march* from those places to a place of general rendezvous, it is difficult to conceive how such a transaction could take place, without exhibiting the appearance of war; without an obvious display of force. At any rate, a Court, in stating generally such a military assemblage as would amount to levying war, and having a case before them, in which there was no assemblage whatever; cannot reasonably be understood in putting such an example, to dispense with those appearances of war, which seem to be required by the general current of authorities. Certainly they ought not to be so understood, when they say in express terms, that, "it is more safe, as well as more consonant to the principles of our Constitution, that the crime of treason should not

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be extended, by construction, to doubtful cases; and that crimes not already within the Constitutional definition, should receive such punishment as the legislature in its wisdom may provide."

After this analysis of the opinion of the Supreme Court, it will be observed, that the direct question, whether an assemblage of men which might be construed to amount to a levying of war, must appear in force or in military form, was not in argument or in fact before the Court; and does not appear to have been in terms decided? The opinion seems to have been drawn without particularly adverting to this question; and therefore, upon a transient view of particular expressions, might inspire the idea, that a display of force; that appearances of war were not necessary ingredients to constitute the fact of levying war. But upon a more intent and more accurate investigation of this opinion, although the terms, force and violence, are not employed as descriptive of the assemblage; such requisites are declared to be indispensable, as can scarcely exist, without the appearance of war and the existence of real force. It is said that war must be levied in fact; that the object must be one which is to be effected by force; that the assemblage must be such as to prove that this is its object; that it must not be an equivocal act, without a warlike appearance; that it must be an open assemblage for the purpose of force. In the course of this opinion, decisions are quoted and approved, which require the employment of force to constitute the crime. It seems extremely difficult, if not impossible, to reconcile these various declarations, with the idea that the Supreme Court considered a secret unarmed meeting, although that meeting be of conspirators; and although it met with a treasonable intent, as an actual levying of war. Without saying that the assemblage must be in force, or in warlike form, they express themselves so as to show, that this idea was never discarded; and they use terms which cannot be otherwise satisfied.

The opinion of a single Judge certainly weighs as nothing, if opposed to that of the Supreme Court: but if he was one of the Judges who assisted in framing that opinion; if, while the impression under which it was framed, was yet fresh upon his mind; he delivered an opinion on the same testimony, not contradictory to that which had been given by all the Judges together; but showing the sense in which he understood terms that might be differently expounded; it may fairly be said to be, in some measure, explanatory of the opinion itself.

To the Judge, before whom the charge against the prisoner at the bar was first brought, the same testimony was offered, with that which had been exhibited before the Supreme Court; and he was required to give an opinion in almost the same case. Upon this occasion he said, "War can only be levied by the employment of actual force. Troops must be embodied: men must be assembled in order to levy war." Again he observed, "The fact to be proved in this case, is an act of public notoriety. It must exist in the view of the world or it cannot exist at all. The assembling of forces to levy war, is a visible transaction, and numbers must witness it."

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It is not easy to doubt, what kind of assemblage was in the mind of the Judge, who used these expressions; and it is to be recollected, that he had just returned from the Supreme Court, and was speaking on the very facts on which the opinion of that Court was delivered.

The same Judge in his charge to the Grand Jury, who found this bill, observed, "to constitute the fact of levying war, it is not necessary that hostilities shall have actually commenced, by engaging the military force of the United States; or that measures of violence against the government shall have been carried into execution. But levying war is a fact in the Constitution of which force is an indispensible ingredient. Any combination to subvert, by force, the government of the United States; violently to dismember the union; to compel a change in the administration; to coerce the repeal or adoption of a general law, is a conspiracy to levy war: and if the conspiracy be carried into effect, by the actual employment of force; by the embodying and assembling of men, for the purpose of executing the treasonable design, which was previously conceived, it amounts to levying of war. It has been held, that arms are not essential to levying war, provided the force assembled be sufficient to attain, or perhaps, to justify attempting the object without them." This paragraph is immediately followed by a reference to the opinion of the Supreme Court.

It requires no commentary upon these words, to show, that in the opinion of the Judge who uttered them, an assemblage of men which should constitute the fact of levying war, must be an assemblage in force; and that he so understood the opinion of the Supreme Court. If, in that opinion, there may be found in some passages, a want of precision; an indefiniteness of expression, which has occasioned it to be differently understood by different persons; that may well be accounted for, when it is recollected that in the particular case, there was no assemblage whatever. In expounding that opinion, the whole should be taken together, and in reference to the particular case in which it was delivered. It is, however, not improbable that the misunderstanding has arisen from this circumstance. The Court unquestionably did not consider arms as an indispensable requisite to levying war; an assemblage, adapted to the object, might be in a condition to effect or to attempt it without them. Nor did the Court consider the actual application of the force to the object, as at all times, an indispensable requisite; for an assemblage might be in a condition to apply force; might be in a state adapted to real war, without having made the actual application of that force. From these positions, which are to be found in the opinion, it may have been inferred, it is thought too hastily, that the nature of the assemblage was unimportant; and that war might be considered, as actually levied, by any meeting of men, if a criminal intention can be imputed to them by testimony of any kind whatever.

It has been thought proper to discuss this question at large, and to review the opinion of the Supreme Court; although this Court would be more disposed to leave the question of fact, whether an overt act of levying war was committed on Blanner-

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hasset's island, to the Jury, under this explanation of the law; and to instruct them, that unless the assemblage on Blannerhasset's island, was an assemblage in force; was a military assemblage in a condition to make war; it was not a levying of war, and that they could not construe it into an act of war, than to arrest the farther testimony which might be offered to connect the prisoner with that assemblage, or to prove the intention of those who assembled together at that place. This point, however, is not to be understood as decided. It will, perhaps, constitute an essential enquiry in another case.

Before leaving the opinion of the Supreme Court entirely, on the question of the nature of the assemblage, which will constitute an act of levying war; this Court cannot forbear to ask, why is an assemblage absolutely required? Is it not to judge in some measure of the end by the proportion which the means bear to the end? Why is it that a single armed individual, entering a boat, and sailing down the Ohio, for the avowed purpose of attacking New Orleans, could not be said to levy war? Is it not, that he is apparently, not in a condition to levy war? If this be so, ought not the assemblage to furnish some evidence of its intention and capacity to levy war, before it can amount to levying war? And ought not the Supreme Court, when speaking of an assemblage, for the purpose of effecting a treasonable object, by force, be understood to indicate an assemblage exhibiting the appearance of force.

The definition of the Attorney for the United States, deserves notice in this respect. It is, "when there is an assemblage of men, convened for the purpose of effecting by force, a treasonable object, which force is meant to be employed before the assemblage disperses; this is treason."

To read this definition without adverting to the argument, we should infer that the assemblage was itself to effect, by force, the treasonable object; not to join itself to some other bodies of men, and then to effect the object by their combined force. Under this construction, it would be expected, the appearance of the assemblage would bear some proportion to the object, and would indicate their intention. At any rate, that it would be an assemblage in force. This construction, is most certainly not that which was intended, but it serves to show, that general phrases must always be understood, in reference to the subject matter, and to the general principles of law.

On that division of the subject which respects the merits of the case, connected with the pleadings, two points are also made.

1st. That this indictment having charged the prisoner with levying war on Blannerhasset's island, and containing no other overt act, cannot be surported by proof, that war was levied at that place by other persons, in the absence of the prisoner, even admitting those persons to be connected with him in one common treasonable conspiracy.

2dly. That, admitting such an indictment could be supported by such evidence, the previous conviction of some person who committed the act, which is said to amount to levying war, is indispensable to the conviction of a person who advised or procured that act.

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As to the first point, the indictment contains two counts, one of which charges, that the prisoner, with a number of persons unknown, levied war on Blannerhasset's island, in the county of Wood, in the district of Virginia; and the other adds, the circumstance of their proceeding from the island down the river, for the purpose of seizing New Orleans by force.

In point of fact, the prisoner was not on Blannerhasset's island nor in the county of Wood, nor in the district of Virginia.

In considering this point, the Court is led first to enquire, whether an indictment for levying war must specify an overt act, or would be sufficient, if it merely charged the prisoner in general terms, with having levied war; omitting the expression of place or circumstance.

The place in which a crime was committed, is essential to an indictment, were it only to show the jurisdiction of the Court. It is also essential for the purpose of enabling the prisoner to make his defence. That, at common law, an indictment would have been defective which did not mention the place in which the crime was committed, can scarcely be doubted. For this, it is sufficient to refer to Hawkins, B. 2, ch. 25, sec. 84, and ch. 23, sec. 91. This necessity is rendered the stronger by the constitutional provision, that the offender "shall be tried in the state and district wherein the crime shall have been committed;" and by the act of Congress which requires, that twelve petty jurors, at least, shall be summoned from the county where the offence was committed.

A description of the particular manner in which the war was levied, seems also essential, to enable the accused to make his defence. The law does not expect a man to be prepared to defend every act of his life which may be suddenly and without notice alleged against him. In common justice, the particular fact with which he is charged ought to be stated; and stated in such a manner as to afford a reasonable certainty of the nature of the accusation, and the circumstances which will be adduced against him. The general docirine on the subject of indictments is full to this point. Foster, p. 149, speaking of the treason of compassing the king's death, says, "From what has been said it followeth, that in every indictment for this species of treason, and indeed for levying war and adhering to the king's enemies, an overt act must be alleged and proved. For the overt act is the charge to which the prisoner must apply his defence."

In page 220, Foster repeats this declaration. It is laid down in Hawk. B. 8, ch. 17, sect 29; 1st Hale, 121; 1st East, 116; and by the other authorities cited, especially in Vaughan's case. In corroboration of this opinion, it may be observed, that treason can only be established by the proof of overt acts; and that by the common law as well as by the statute of 7th of William 3d, those overt acts only, which are charged in the indictment, can be given in evidence; unless, perhaps, as corroborative testimony, after the overt acts are proved. That clause in the Coustitution too, which says, that in all criminal prosecutions, the accused shall enjoy the right "to be informed of the nature and cause of the accusation;" is considered as having a direct bearing on this

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point. It secures to him such information as will enable him to prepare for his defence.

It seems then to be perfectly clear, that it would not be sufficient for an indictment to allege generally, that the accused had levied war against the United States. The charge must be more particularly specified, by laying what is termed an overt act of levying war. The law relative to an appeal, as cited from Stamford, is strongly corroborative of this opinion.

If it be necessary to specify the charge in the indictment, it would seem to follow, irresistably, that the charge must be proved as laid.

All the authorities which require an overt act, require also that this overt act should be proved. The decision in Vaughan's case is particularly in point. Might it be otherwise, the charge of an overt act would be a mischief, instead of an advantage, to the accused. It would lead him from the true cause and nature of the accusation, instead of informing him respecting it.

But it is contended on the part of the prosecution, that although the accused had been never with the party which assembled at Blannerhasset's island, and was, at the time, at a great distance, and in a different state, he was yet legally present; and, therefore, may properly be charged in the indictment as being present in fact.

It is, therefore, necessary to enquire, whether in this case, the doctrine of constructive presence can apply.

It is conceived by the Court to be possible, that a person may be concerned in a treasonable conspiracy, and yet be legally, as well as actually absent, while some one act of the treason is perpetrated. If a rebellion should be so extensive, as to spread through every state in the Union, it will scarcely be contended, that every individual concerned in it is legally present at every overt act committed in the course of that rebellion. It would be a very violent presumption, indeed, too violent to be made without clear authority, to presume, that even the chief of the rebel army was legally present at every such overt act. If the main rebel army, with the chief at its head, should be prosecuting war at one extremity of our territory, say, in New Hampshire; if this chief should be there captured, and sent to the other extremity for the purpose of trial; if his indictment, instead af alleging an overt act which was true, in point of fact, should allege, that he had assembled some small party, which in truth he had not seen, and had levied war, by engaging in a skirmish in Georgia, at a time when, in reality, he was fighting a battle in New Hampshire; if such evidence would support such an indictment, by the fiction, that he was legally present, though really absent, all would ask, to what purpose are those provisions in the Constitution, which direct the place of trial, and ordain that the accused shall be informed of the nature and cause of the accusation?

But, that a man may be legally absent, who has counselled or procured a treasonable act, is proved by all those books which treat upon the subject; and which concur in declaring, that such a person is a principal traitor, not because he was legally present, but because, in treason, all are principals. Yet the indictment, I say, upon general principles, would charge him accord-

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ing to the truth of the case Lord Coke says, " if many conspire to levy war, and some of them do levy the same according to the conspiracy, this is high treason in all." Why? Because all were legally present when the war was levied? No. " For in treason, continues Lord Coke, all be principals, and war is levied." In this case, the indictment, reasoning from analogy, would not charge, that the absent conspirators were present, but would state the truth of the case. If the conspirator had done nothing which amounted to levying of war, and if, by our Constitution, the doctrine, that an accessary becomes a principal, be not adopted; in consequence of which the conspirator could not be condemned, under an indictment stating the truth of the case; it would be going very far to say, that this defect, if it be termed one, may be cured, by an indictment stating the case untruly.

This doctrine of Lord Coke has been adopted by all subsequent writers; and it is generally laid down in the English books, that whatever will make a man an accessary in felony, will make him a principal in treason: but it is no where suggested, that he is, by construction, to be considered as present, when, in point of fact, he was absent.

Foster third, has been particularly quoted, and certainly he is precisely in point. " It is well known, says Foster, that in the language of the case, there are no accessaries in high treason; all are principals. Every instance of incitement, aid, or protection, which in the case of felony, will render a man an accessary before or after the fact, in the case of high treason, whether it be treason at common law, or by statute, will make him a principal in treason." The cases of incitement and aid, are cases put as examples of a man's becoming a principal in treason; not because he was legally present, but by force of that maxim in the common law, that whatever will render a man an accessary at common law, will render him a principal in treason. In other passages, the words, " command," or " procure," are used to indicate the same state of things; that is, a treasonable assemblage, produced by a man who is not himself in that assemblage.

In point of law, then, the man who incites, aids, or procures a treasoable act, is not merely in consequence of that incitement, aid, or procurement, legally present when that act is committed.

If it does not result from the nature of the crime, that all who are concerned in it, are legally present at every overt act, then each case depends upon its own circumstances; and to judge how far the circumstances of any case can make him legally present, who is in fact absent, the doctrine of constructive presence must be examined.

Hale, in his 1 vol. p. 615, says, " regularly no man can be a principal in felony unless he be present." In the same page he says, " an accessary *before*, is he that being absent at the time of the felony committed, doth yet procure, counsel, or command another to commit a felony." The books are full of passages which state this to be the law. Foster, in showing what acts of concurrence will make a man a principal, says, " he must be present at the perpetration, otherwise he can be no more than an accessary before the fact."

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These strong distinctions would be idle to treason; at any rate they would be inapplicable, if they were to be entirely lost in the doctrine of constructive presence.

Foster adds (p. 349) "when the law requireth the presence of the accomplices at the perpetration of the fact, in order to render him a principal, it doth not require a strict actual immediate presence, such a presence, as would make him an eye or ear witness of what passeth." The terms used by Foster, are such, as would be employed by a man, intending to show the necessity, that the absent person should be near at hand, although, from the nature of the thing, no precise distance could be marked out. An inspection of the cases from which Foster drew this general principle, will serve to illustrate it. Hale 439. In all these cases, put by Hale, the whole party set out together to commit the very fact charged in the indictment, or to commit some other unlawful act, in which they are all to be personally concerned at the same time and place, and are at the very time when the criminal fact is committed, near enough to give actual personal aid and assistance to the man who perpetrated it. Hale in p. 449, giving the reason for the decision in the case of the word Decree, says, "they all came with an intent to steal the deer, and, consequently the law supposes that they came all with the intent to oppose all that should hinder them in that design. The original case says this was their resolution. This opposition would be a personal opposition. This case even as stated by Hale, would clearly not comprehend any man who entered into the combination; but who, instead of going to the park where the murder was committed, should not set out with the others, should go to a different park, or should even lose his way. Hale 534.

In both the cases here stated, the persons actually set out together, and were near enough to assist in the commission of the fact. That, in the case of Pudsy, the felony was, as stated by Hale, a different felony from the originally intended, is unimportant, in regard to the particular principal now under consideration, so far as respected distance, as respected capacity to assist in case of resistance, it is the same as if the robbery had been that which was originally designed. The case in the original report shows, that the felony committed, was, in fact, in pursuance of that originally designed.—Foster 358, plainly supposes the same particular design: not a general design, composed of many particular distinct facts. He supposes them to be co-operating with respect to that particular design. This may be illustrated by a case, which is perhaps common. Suppose a band of robbers, confederated for the purpose of robbing. They set out together, or in parties, to rob a particular individual, and each performs the part assigned to him. Some ride up to the individual and demand his purse; others watch out of sight to intercept those who might be coming to assist the man, on whom the robbery is to be committed. If murder, or robbery, actually takes place, all the principals, and all in construction of law are present. But, suppose they set out at the same time, or at different times, by different roads, to attack and rob different individuals, or different companies; to commit distinct acts of rob-

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bery. It has never been contended, that those who committed one act of robbery, or who failed, altogether, were constructively present at the act of those who were associated with them in the common object of robbery, who were to share the plunder, but who did not assist at the particular fact. They do indeed belong to the general party, but they are not of the particular party which committed this fact. Foster concludes this subject, by observing, that "in order to render a person an accomplice and a principal in felony, he must be aiding and abetting at the fact, or ready to afford assistance if necessary." That is, at the particular fact which is charged, he must be ready to render assistance to those who are committing that particular fact; he must, as is stated by Hawkins, be ready to give immediate and direct assistance.

All the cases to be found in the books, go to the same point. Let them be applied to that under consideration.

The whole treason laid in this indictment, is the levying of war in Blannerhasset's island; and the whole question to which the enquiry of the Court is now directed, is, whether the prisoner was legally present at that fact.

I say this is the whole question, because the prisoner can only be convicted on the overt act laid in the indictment. With respect to this prosecution, it is as if no other overt act existed. If other overt acts can be enquired into, it is for the sole purpose of proving the particular fact charged: it is as evidence of the crime consisting of this particular fact, not as establishing the general crime by a distinct fact.

The counsel for the prosecution, have charged those engaged in the defence, with considering the overt act as the treason; whereas it ought to be considered solely as the evidence of the treason; but the counsel for the prosecution seem themselves not to have sufficiently adverted to this clear principle, that though the overt act may not be itself the treason, it is the sole act of that treason, which can produce conviction. It is the sole point in issue between the parties. And the only division of that point, if the expression be allowed, which the Court is now examining, is the constructive presence of the prisoner at the fact charged.

To return then to the application of the cases.

Had the prisoner set out with the party from Beaver for Blannerhasset's island; or perhaps, had he set out for that place though not from Beaver, and had arrived in the island, he would have been present at the fact; had he not arrived in the island, but had taken a position near enough to co-operate with those on the island, to assist them in any act of hostility, or to aid them if attacked; the question, whether he was constructively present, would be a question compounded of law and fact, which would be decided by the Jury, with the aid of the Court, so far as respected the law. In this case, the accused would have been of the particular party assembled on the island, and would have been associated with them in the particular act of levying war, said to have been committed on the island.

But if he was not with the party at any time before they reached the island; if he did not join them there, or intend to join them

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there; if his personal co-operation in the general plan was to be afforded elsewhere, at a greater distance, in a different state; if the overt acts of treason to be performed by him were to be distinct overt acts; then he was not of the particular party assembled at Blannerhasset's island, and was not constructively present, aiding and assisting in the particular act, which was there committed.

The testimony on this point, so far as it has been delivered, is not equivocal. There is not only no evidence that the accused was of the particular party which assembled at Blannerhasset's island, but the whole evidence shows he was not of that party.

In felony then, admitting the crime to have been completed on the island, and to have been advised, procured or commanded by the accused, he would have been incontestably an accessary, and not a principal.

But, in treason, it is said, the law is otherwise, because the theatre of action is more extensive.

The reasoning applies in England, as strongly as in the United States. While in '15 and '45 the family of Steuart sought to regain the crown they had forfeited, the struggle was for the whole kingdom; yet no man was ever confined as legally present at one place, when actually at another; or as aiding in the transaction, while actually employed in another.

With the perfect knowledge that the whole nation may be a theatre of action, the English books unite in declaring, that he who counsels, procures, or aids treason, is guilty accessorially and solely in virtue of the common law principle, that what will make man an accessary in felony, makes him a principal in treason. So far from considering man as constructively present at every overt act of the general treason, in which he may have been concerned; the whole doctrine of the books limits the proof against him, to those particular overt acts of levying war, with which he is charged.

What would be the effect of a different doctrine? Clearly that which has been stated. If a person, levying war in Kentucky, may be said, to be constructively present, and assembled with a party carrying on war in Virginia, at a great distance from him; then he is present at every overt act performed any where; he may be tried in any state on the continent, where any overt act has been committed; he may be proved to be guilty of an overt act laid in the indictment, in which he had no personal participation, by proving that he advised it, or that he committed other acts.

This is, perhaps, too extravagant to be in terms maintained. Certainly it cannot be supported by the doctrine of the English law.

The opinion of Judge Patterson in Mitchell's case, has been cited on this point. 2 Dal. 348.

The indictment is not specially stated; but, from the case as reported, it must have been either general for levying war in the county of Alleghany, and the overt act laid, must have been the assemblage of men, and levying of war in that county; or it must have been a particular detail of the treasonable transactions in that county. The first supposition is the most probable;

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but let the indictment be in the one form or the other, and the result is the same. The facts of the case are, that a large body of men, of whom Mitchell was one, assembled at Braddock's field, in the county of Alleghany, for the purpose of committing acts of violence at Pittsburg. That there was also an assemblage at a different time at Couches fort, at which the prisoner also attended. The general, and avowed object of that meeting, was to concert measures for resisting the execution of a public law. At Couches fort, the resolution was taken to attack the house of the inspector, and the body there assembled, marched to that house and attacked it. It was proved by the competent number of witnesses, that he was at Couches fort armed; that he offered to reconnoitre the house to be attacked; that he marched with the insurgents towards the house; that he was with them after the action, attending the body of one of his comrades, who was killed in it; one witness swore positively that he was present at the burning of the house; and a second witness said that "it ran in his head that he had seen him there." That a doubt should exist in such a case as this, is strong evidence of the necessity, that the overt act should be unequivocally proved by two witnesses.

But what was the opinion of the Judge in this case? Couches fort and Neville's house being in the same county, the assemblage having been at Couches fort, and the resolution to attack the house, having been there taken, the body having for the avowed purposes moved in execution of that resolution towards the house to be attacked; he inclined to think that the act of marching, was in itself levying war. If it was, then the overt act laid in the indictment, was consummated by the assemblage at Couches, and the marching from thence: and Mitchell was proved to be guilty by more than two positive witnesses. But without deciding this to be the law, he proceeded to consider the meeting at Couches, the immediate marching to Neville's house, as one transaction. Mitchell was proved, by more than two positive witnesses, to have been in that transaction; to have taken active part in it, and the Judge declared it to be unnecessary that all should have seen him at the same time and place.

But suppose not a single witness had proved Mitchell to have been at Couches, or on the march, or at Neville's. Suppose he had been at the time, notoriously absent in a different state. Can it be believed by any person, who observes the caution with which Judge Patterson required the Constitutional proof of two witnesses, to the same overt act; that he would have said Mitchell was constructively present, and might on that straining of a legal fiction, be found guilty of treason? Had he delivered such an opinion, what would have been the language of this country respecting it? Had he given this opinion, it would have required all the correctness of his life to strike his name from that bloody list, in which the name of Jeffries is enrolled.

But to estimate the opinion in Mitchell's case, let its circumstances be transferred to Burr's case. Suppose the body of men assembled in Blannerhasset's island, had previously met at some other place in the same county, and that Burr had been proved to be with them by four witnesses; that the resolution to march

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to Blannerhasset's island, for a treasonable purpose, had been there taken; that he had been seen on the march with them; that one witness had seen him on the island; that another thought he had seen him there; that he had been seen with the party directly after leaving the island; that this indictment had charged the levying of war, in Wood county generally; the cases would then have been precisely parallel, and the decisions would have been the same.

In conformity with principles and with authority then, the prisoner at the bar was neither legally nor actually present at Blannerhasset's island; and the Court is strongly inclined to the opinion, that without proving an actual or legal presence, by two witnesses, the overt act laid in this indictment cannot be proved.

But this opinion is controverted on two grounds.

The first is, that the indictment does not charge the prisoner to have been present.

The second, that although he was absent, yet, if he caused the assemblage, he may be indicted as being present, and convicted on evidence that he caused the treasonable act.

The first position is to be decided itself. The Court understands the allegation differently from the Attorney for the United States. The Court understands it to be directly charged, that the prisoner did assemble with the multitude, and did march with them. Nothing will more clearly test this construction, than putting the case into a shape which it may possibly take. Suppose the law to be, that the indictment would be defective, unless it alleged the presence of the person indicted at the act of treason. If upon a special verdict, facts should be found, which amounted to a levying of war by the accused, and his Counsel should insist that he could not be condemned, because the indictment was defective, in not charging that he was himself one of the assemblage, which constituted the treason; or because it alleged the procurement defectively, would the Attorney admit this construction of his indictment to be correct? I am persuaded that he would not, and that he ought not, to make a concession. If, after a verdict, the indictment ought to be construed to allege that the prisoner was one of the assemblage at Blannerhasset's island, it ought to be construed now. But this is unimportant; for if the indictment alleges that the prisoner procured the assemblage, that procurement becomes part of the overt act, and must be proved, as will be shown hereafter.

The second position is founded on 1 Hale, 214, 238—and 1 East, 127.

While I declare, that this doctrine contradicts every idea I had ever entertained on the subject of indictments, since it admits that one case may be stated, and a very different case may be proved; I will acknowledge, that it is countenanced by the authorities adduced in its support. To counsel or advise a treasonable assemblage, and to be one of that assemblage, are certainly distinct acts; and therefore, ought not to be charged as the same act. The great objection to this mode of proceeding, is, that the proof essentially varies from the charge in the char-

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acter and essence of the offence; and in the testimony by which the accused is to defend himself. These dicta of Lord Hale, therefore, taken in the extent, in which they are understood by the Counsel for the United States, seem to be repugnant to the declarations we find every where; that an overt act must be laid, and must be proved. No case is cited by Hale in support of them; and I am strongly inclined to the opinion, that, had the public received his corrected, instead of his original manuscript, they would, if not expunged, have been restrained in their application to cases of a particular description. Laid down generally, and applied universally to all cases of treason, they are repugnant to the principles for which Hale contends; for which all the elementary writers contend; and from which Courts have in no case, either directly reported or referred to, in the books, ever departed. These principles are, that the indictment must give notice of the offence; that the accused is only bound to answer the particular charge, which the indictment contains; and that the overt act laid, is that particular charge. Under such circumstances, it is only doing justice to Hale, to examine his dicta; and if they will admit of being understood, in a limited sense, not repugnant to his own doctrines, nor to the general principles of law, to understand them in that sense.

"If many conspire to counterfeit, or counsel, or abet it, and one of them doth the fact upon that counselling or conspiracy, it is treason in all; and they may be all indicted for counterfeiting generally within this statute; for in such case, in treason, all are principals."

This is laid down, as applicable singly to the treason of counterfeiting the coin; and is not applied by Hale to other treasons. Had he designed to apply the principle universally, he would have stated it as a general proposition; he would have laid it down in treating on other branches of the statute, as well as in the chapter respecting the coin; he would have laid it down when treating on indictments generally. But he has done neither. Every sentiment bearing in any manner on this point, which is to be found in Lord Hale; while on the doctrine of levying war, or on the general doctrine of indictments; militates against the opinion, that he considered the proposition as more extensive than he has declared it to be. No Court could be justified, in extending the dictum of a Judge beyond its terms, to cases in which he has expressly treated; to which he has not himself applied it; and on which he, as well as others, has delivered opinions which that dictum would overrule. This would be the less justifiable, if there should be a clear legal distinction indicated by the very terms, in which the Judge has expressed himself, between the particular case; to which alone he has applied the dictum, and other cases to which the Court is required to extend it.

There is this clear legal distinction. "They may, says Judge Hale, be indicted for counterfeiting generally." But if many conspire to levy war, and some actually levy it, they may not be indicted for levying war generally. The books concur in declaring that they cannot be so indicted. A special overt act of levy-

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ing war must be laid. This distinction between counterfeiting the coins, and that class of treasons among which levying war is placed, is taken in the statute of Edward 3d. That statute requires an overt act of levying war, to be laid in the indictment; and does not require an overt act of counterfeiting the coin to be laid. If, in a particular case, where a general indictment is sufficient, it be stated, that the crime may be charged generally, according to the legal effect of the act; it does not follow, that in other cases, where a general indictment would be insufficient; where an overt act must be laid; that this overt act need not be laid according to the real fact. Hale then is to be reconciled with himself, and with the general principles of law, only by permitting the limits which he has himself given to his own dictum, to remain where he has placed them.

In page 238, Hale, in speaking generally of the receiver of a traitor, and in stating in what such receiver partakes of an accessary. 1st. "His indictment must be special of the receipt, and not generally that he did the thing, which may be otherwise, in case of one that is procurer, counsellor or consenter."

The words "*may* be otherwise," do not clearly convey the idea, that it is universally otherwise. In all cases of a receiver, the indictment *must* be special on the receipt, and not general. The words it "*may* be otherwise in case of a procuror," &c. signify that it may be otherwise, in all treasons, or that it may be otherwise in some treasons. If it may be otherwise in some treasons, without contradicting the doctrines of Hale himself, as well as of other writers; but cannot be otherwise, in all treasons, without such contradiction; the fair construction is, that Hale used these words in their restricted sense; that he used them in reference to treasons, in which a general indictment would lie; not to treasons where a general indictment would not lie, but an overt act of the treason must be charged. The two passages of Hale, thus construed, may perhaps be law, and may leave him consistent with himself. It appears to the Court, to be the fair way of construing them.

These observations relative to the passages quoted from Hale, apply to that quoted from East; who obviously copies from Hale, and relies upon his authority.

Upon this point, Kelyng 26, and 1st Hale 626, have also been relied upon. It is stated in both, that if a man be indicted as a principal, and acquitted; he cannot afterwards be indicted as accessary before the fact. Whence it is inferred, not without reason, that evidence of accessorial guilt, may be received on such an indictment. Yet no case is found, in which the question has been made and decided. The objection has never been taken at a trial and overruled; nor do the books say it would be overruled. Were such a case produced, its application would be questionable. Kelyng says, an accessary before the fact is *quodam modo*, in some manner guilty of the fact. The law may not require that the manner should be stated; for in felony, it does not require that an overt act should be laid. The indictment therefore, may be general. But an overt act of levying war must be laid. These cases then, prove in their utmost extent, no more than the cases previously cited from Hale and

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East. This distinction between indictments, which may state the fact generally; and those which must lay specially, bear some analogy to a general and a special action on the case. In a general action, the declaration may lay the assumpsit according to the legal effect of the transaction; but in a special action on the case, the declaration must state the material circumstance truly, and they must be proved as stated. This distinction also derives some aid from a passage in Hale, 625, immediately preceding that which has been cited at the bar. He says, "If A be indicted as principal, and B as accessary, *before* or *after*, and both be acquited; yet B may be indicted as principal, and the former acquittal as accessary is no bar."

The crimes then are not the same, and may not indifferently be tried under the same indictment. But why is it, that an acquittal as principal, may be pleaded in bar to an indictment as accessary; while an acquittal as accessary, may not be pleaded in bar to an indictment as principal? If it be answered, that the accessorial crime may be given in evidence, on an indictment as principal; but that the principal crime may not be given in evidence, on an indictment as accessary; the question recurs, on what legal ground does this distinction stand? I can imagine only this. An accessary being *quodam modo* a principal, in indictments where the law does not require the manner to be stated, which need not be special; evidence of accessorial guilt, if the punishment be the same, may possibly be received: but every indictment as an accessary must be special. The very allegation that he is an accessary, must be a special allegation, and must show how he became an accessary. The charges of this special indictment, therefore, must be proved as laid; and no evidence which proves the crime, in a form substantially different, can be received. If this be the legal reason for the distinction, it supports the exposition of these dicta which has been given. If it be not the legal reason, I can conceive no other.

But suppose the law to be as is contended by the Counsel for the United States. Suppose an indictment, charging an individual with personally assembling among others, and thus levying war, may be satisfied with the proof that he caused the assemblage. What effect will this law have upon this case?

The guilt of the accused, if there be any guilt, does not consist in the assemblage; for he was not a member of it. The simple fact of assemblage, no more effects one absent man than another. His guilt then, consists in procuring the assemblage; and upon this fact depends his criminality. The proof relative to the character of an assemblage, must be the same, whether a man be present or absent. In the general, to charge any individual with the guilt of an assemblage, the fact of his presence must be proved. It constitutes an essential part of the overt act. If then, the procurement be substituted in the place of presence, does it not also constitute an essential part of the overt act? Must it not also be proved? Must it not be proved in the same manner, that presence must be proved? If in one case, the presence of the individual makes the guilt of the assemblage his guilt; and in the other case, the procurement by the individual, makes the guilt of the assemblage his guilt: then

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presence and procurement, are equally component parts of the overt act, and equally require two witnesses.

Collateral points may, say the books, be proved according to the course of the common law; but is this a collateral point? Is the fact, without which the accused does not participate in the guilt of the assemblage, if it was guilty, a collateral point? This cannot be. The presence of the party, where presence is necessary, being a part of the overt act, must be positively proved by two witnesses. No presumptive evidence; no facts from which presence may be conjectured or inferred, will satisfy the Constitution and the law. If procurement take the place of presence, and become part of the overt act, then no presumptive evidence; no facts from which the procurement may be conjectured or inferred, can satisfy the Constitution and the law. The mind is not to be led to the conclusion, that the individual was present, by a train of conjectures, of inferences, or of reasoning; the fact must be proved by two witnesses. Neither where procurement supplies the want or presence, is the mind to be conducted to the conclusion, that the accused procured the assembly, by a train of conjectures, of inferences, or of reasoning; the fact itself, must be proved by two witnesses, and must have been committed within the district.

If it be said, that the advising or procurement of treason, is a secret transaction, which can scarcely ever be proved, in the manner required by this opinion; the answer which will readily suggest itself, is, that the difficulty of proving a fact, will not justify conviction without proof. Certainly it will not justify conviction, without a direct and positive witness, in a case where the Constitution requires two. The more correct inference from this circumstance, would seem to be, that the advising of the fact, is not within the Constitutional definition of the crime. To advise or procure a treason, is in the nature of conspiring or plotting treason; which is not treason in itself.

If then, the doctrines of Kelyng, Hale, and East, are to be understood, in the sense, in which they are pressed by the Counsel for the prosecution, and are applicable in the United States; the fact that the accused procured the assemblage on Blannerhasset's island must be proved; not circumstantially, but positively, by two witnesses, to charge him with that assemblage. But there are still other most important considerations, which must be well weighed, before this doctrine can be applied to the United States.

The eighth amendment to the Constitution, has been pressed with great force; and it is impossible not to feel its application to this point. The accused, cannot be truly said to be "informed of the nature and cause of the accusation;" unless the indictment shall give him that notice, which may reasonably suggest to him the point on which the accusation turns; so that he may know the course to be pursued in his defence.

It is also well worthy of consideration, that this doctrine, so far as it respects treason, is entirely supported by the operation of the common law; which is said to convert the accessary, before the fact, into the principal, and to make the act of the principal his act. The accessary, before the fact, is not said to

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have levied war. He is not said to be guilty under the statute. But the common law attaches to him the guilt of that fact, which he has advised or procured; and as contended, makes it his act. This is the operation of the common law, not the operation of the statute. It is an operation then, which can only be performed, where the common law exists to perform it. It is the creature of the common law, and the creature pre-supposes its creator. To decide then, that this doctrine is applicable to the United States, would seem to imply the decision, that the United States, as a nation, have a common law, which creates and defines the punishment of crimes, accessorial in their nature. It would imply the further decision, that these accessorial crimes are not, in the case of treason, excluded by the definition of treason given in the Constitution. I will not pretend that I have not individually, an opinion on these points; but it is one which I should give only in a case absolutely requiring it, unless I could confer respecting it, with the Judges of the Supreme Court.

I have said that this doctrine cannot apply to the United States, without implying those decisions respecting the common law, which I have stated; because, should it be true, as is contended, that the constitutional definition of treason comprehends him who advises, or procures, an assemblage that levies war, it would not follow that such adviser, or procurer, might be charged as having been present at the assemblage. If the adviser, or porcurer, is within the definition of levying war; and, independent of the agency of the common law, does actually levy war, then the advisement or procurement is an overt act of levying war. If it be the overt act, on which he is to be convicted, then it must be charged in the indictment; for he can only be convicted on proof of the overt acts which are charged.

To render this distinction more intelligible, let it be recollected, that although it should be conceded, that since the statute of William and Mary, he who advises or procures a treason, may, in England, be charged as having committed that treason, by virtue of the common law operation, which is said, so far as respects the indictment, to unite the accessorial to the principal offence, and permit them to be charged as one, yet it can never be conceded, that he who commits one overt act under the statute of Edward, can be charged and convicted on proof of another overt act. If then procurement be an overt act of treason, under the Constitution, no man can be convicted for the procurement under an indictment charging him with actually assembling; whatever may be the doctrine of the common law in the case of an accesorial offender.

It may not be improper in this place, again to advert to the opinion of the Supreme Court, and to show that it contains nothing contrary to the doctrine now laid down. That opinion is, that an individual may be guilty of treason "who has not appeared in arms against his country: that if war be actually levied, that is, if a body of men, be actually assembled for the purpose of effecting, by force, a treasonable object; all those who perform any part, however minute, or however remote from the scene of action; and who, are actually leagued in the general conspiracy, are to be considered as traitors."

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This opinion does not touch the case of a person who advises, or procures an assemblage, and does nothing further. The advising, certainly, and perhaps the procuring, is more in the nature of a conspiracy to levy war, than of the actual levying of war. According to the opinion, it is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part; that part is, the act of levying war. This part, it is true, may be minute; it may not be the actual appearance in arms; and it may be remote from the scene of action, that is, from the place where the army is assembled; but it must be a part, and that part must be performed by a person, who is leagued in the conspiracy. This part, however minute, or remote, constitutes the overt act, on which alone the person who performs it can be convicted.

The opinion does not declare, that the person, who has performed this remote and minute part, may be indicted for a part, which was in truth, performed by others, and convicted on their overt acts. It amounts to this, and nothing more, that when war is actually levied, not only those who bear arms, but those also, who are leagued in the conspiracy, and who perform the various distinct parts, which are necessary for the prosecution of war, do in the sense of the Constitution levy war. It may possibly be the opinion of the Supreme Court, that those who procure a treason, and do nothing further, are guilty under the Constitution; I only say that opinion has not yet been given; still less has it been indicated, that he who advises, shall be indicted, as having performed the fact.

It has been the opinion of the Court, that this indictment can be supported only by testimony, which proves the accused to have been actually, or constructively present, when the assemblage took place on Blannerhasset's island; or by the admission of the doctrine, that he who procures an act, may be indicted as having performed that act.

It is further the opinion of the Court, that there is no testimony whatever, which tends to prove that the accused was actually or constructively present when that assemblage did take place. Indeed, the contrary is most apparent. With respect to admitting proof of procurement to establish a charge of actual presence, the Court is of opinion, that if this be admissible in England on an indictment for levying war, which is far from being conceded; it is admissible only by virtue of the operation of the common law upon the statute, and therefore, is not admissible in this country, unless by virtue of a similar operation; a point, far from being established, but on which, for the present, no opinion is given. If, however, this point be established, still the procurement must be proved in the same manner, and by the same kind of testimony, which would be required to prove actual presence.

The second point in this division of the subject, is, the necessity of adducing the record of the previous conviction of some one person, who committed the fact alleged to be treasonable.

This point pre-supposes the treason of the accused, if any has been committed, to be accessorial in its nature. It's being of this description, according to the British authorities, depends

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on the presence, or absence of the accused, at the time the fact was committed. The doctrine on this subject, is well understood; has been most copiously explained, and need not be repeated. That there is no evidence of his actual, or legal presence, is a point already discussed and decided. It is then apparent, that, but for the exception to the general principle, which is made in cases of treason, those who assembled at Blannerhasset's island, if that assemblage was such as to constitute the crime, would be principals; and those who might really have caused that assemblage, although, in truth the chief traitors, would in law be accessaries.

It is a settled principle in the law, that the accessary cannot be guilty of a greater offence than his principal. The maxim is, accessorius sequitur naturam sui principalis: the accessary follows the nature of his principal. Hence results the necessity of establishing the guilt of the principal, before the accessary can be tried. For the degree of guilt which is incurred by counselling or commanding the commission of a crime, depends upon the actual commission of that crime. No man is an accessary to murder, unless the fact has been committed.

The fact can only be established in a prosecution against the person by whom a crime has been perpetrated. The law supposes a man more capable of defending his own conduct, than any other person; and will not tolerate that the guilt of A shall be established in a prosecution against B. Consequently, if the guilt of B depends on the guilt of A, A must be convicted, before B can be tried. It would exhibit a monstrous deformity, indeed, in our system, if B might be executed for being accessary to a murder committed by A, and A should afterwards upon a full trial be acquitted of the fact. For this obvious reason: although the punishment of a principal and accessary was originally the same; and although, in many instances, it is still the same, the accessary could in no case be tried, before the conviction of his principal; nor can he yet be tried previous to such conviction, unless he requires it, or unless a special provision to that effect be made by statute.

If then, this was felony, the prisoner at the bar could not be tried until the crime was established by the conviction of the person, by whom it was actually perpetrated.

Is the law otherwise in this case, because in treason, all are principals?

Let this question be answered by reason and by authority.

Why is it, that in felonies, however attrocious, the trial of the accessary can never precede the conviction of the principal? Not because the one is denominated the principal, and the other the accessary; for that would be ground on which a great law principle could never stand. Not, because there was in fact a difference in the degree of moral guilt; for, in the case of murder committed by a hardy villain, for a bribe, the person plotting the murder, and giving the bribe, is, perhaps, of the two, the blacker criminal; and, were it otherwise, this would furnish no argument for precedence in trial.

What then is the reason?

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It has been already given. The legal guilt of the accessary depends on the guilt of the principal; and the guilt of the principal can only be established in a prosecution against himself.

Does not this reason apply in full force to a case of treason?

The legal guilt of the person, who planned the assemblage on Blannerhasset's island, depends not simply on the criminality of the previous conspiracy, but on the criminality of that assemblage. If those who perpetrated the fact be not traitors, he who advised the fact cannot be a traitor. His guilt then, in contemplation of law, depends on theirs; and their guilt can only be established in a prosecution against themselves. Whether the adviser of this assemblage be punishable with death, as a principal, or as an accessary, his liability to punishment, depends on the degree of guilt, attached to an act, which has been perpetrated by others; and which, if it be a criminal act, renders them guilty also. His guilt, therefore, depends on theirs, and their guilt cannot be legally established, in a prosecution against him.

The whole reason of the law, then, relative to the principal and accessary, so far as respects the order of trial, seems to apply in full force, to a case of treason committed by one body of men, in conspiracy with others, who are absent.

If, from reason we pass to authority, we find it laid down by Hale, Foster, and East, in the most explicit terms, that the conviction of some one, who has committed the treason, must precede the trial of him who has advised or procured it. This position is also maintained by Leach, in his notes on Hawkins; and is not, so far as the Court has discovered, any where contradicted.

These authorities have been read and commented on at such length, that it cannot be necessary for the Court to bring them again into view. It is less necessary, because it is not understood that the law is controverted by the counsel for the United States.

It is, however, contended, that the prisoner has waved his right to demand the conviction of some one person who was present at the fact, by pleading to his indictment.

Had this indictment even charged the prisoner, according to the truth of the case, the Court would feel some difficulty in deciding, that he had, by implication, waved his right to demand a species of testimony essential to his conviction. The Court is not prepared to say, that the act which is to operate against his rights, did not require, that it should be performed with a full knowledge of its operation. It would seem consonant to the usual course of proceeding in other respects, in criminal cases, that the prisoner should be informed, that he had a right to refuse to be tried, until some person who committed the act should be convicted; and that he ought not to be considered as waving the right to demand the record of conviction, unless with the full knowledge of that right he consented to be tried. The Court, however, does not decide what the law would be in such a case. It is unnecessary to decide it; because pleading to an indictment in which a man is charged as having committed an act, cannot be construed to wave a right which he would have possessed,

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had he been charged with having advised the act. No person indicted as a principal, can be expected to say I am not a principal, I am an accessary; I did not commit, I only advised the act.

The authority of the English cases, on this subject, depends, in a great measure, on the adoption of the common law doctrine of accessorial treasons. If that doctrine be excluded, this branch of it may not be directly applicable to treasons committed within the United States. If the crime of advising or procuring a levying of war, be within the constitutional definition of treason, then he who advises or procures it, must be indicted on the very fact; and the question, whether the treasonableness of the act may be decided, in the first instance, in the trial of him who procured it, or must be decided in the trial of one who committed it, will depend upon the reason, as it respects the law of evidence, which produced the British decisions with regard to the trial of principal and accessary, rather than on the positive authority of those decisions.

This question is not essential in the present case, because, if the crime be within the constitutional definition, it is an overt act of levying war; and to produce a conviction ought to have been charged in the indictment.

The law of the case being thus far settled, what ought to be the decision of the Court on the present motion? Ought the Court to sit and hear testimony which cannot affect the prisoner, or ought the Court to arrest that testimony? On this question much has been said—much that may perhaps be ascribed to a misconception of the point really under consideration. The motion has been treated as a motion confessedly made to stop relevant testimony; and in the course of the argument, it has been repeatedly stated by those who oppose the motion, that irrelevant testimony may and ought to be stopped. That this statement is perfectly correct, is one of those fundamental principles, in judicial proceedings, which is acknowledged by all, and is founded in the absolute necessity of the thing. No person will contend, that in a civil or criminal case, either party is at liberty to introduce what testimony he pleases, legal or illegal; and to consume the whole term in details of facts unconnected with the particular case. Some tribunal then must decide on the admissibility of testimony. The parties cannot constitute this tribunal, for they do not agree. The Jury cannot constitute it, for the question is, whether they shall hear the testimony or not. Who, then, but the Court can constitute it? It is of necessity the peculiar province of the Court, to judge of the admissibility of testimony. If the Court admit improper, or reject proper testimony, it is an error of judgment; but it is an error committed in the direct exercise of their judicial functions.

The present indictment charges the prisoner with levying war against the United States, and alleges an overt act of levying war. That overt act must be proved, according to the mandates of the Constitution, and of the act of Congress, by two witnesses. It is not proved by a single witness. The presence of the accused has been stated to be an essential component part of the overt act in this indictment; unless the common law principle

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respecting accessaries, should render it unnecessary; and there is not only no witness, who has proved his actual or legal presence, but the fact of his absence is not controverted. The counsel for the prosecution offer to give, in evidence, subsequent transactions, at a different place, and in a different State; in order to prove what? The overt act laid in the indictment? That the prisoner was one of those who assembled at Blannerhasset's island? No—that is not alleged. It is well known that such testimony is not competent to establish such a fact. The Constitution and law require, that the fact should be established by two witnesses; not by the establishment of other facts, from which the Jury might reason to this fact. The testimony then is not relevant. If it can be introduced, it is only in the character of corroborative, or confirmatory testimony, after the overt act has been proved by two witnesses, in such manner, that the question of fact ought to be left with the Jury. The conclusion, that in this state of things no testimony can be admissible, is so inevitable, that the counsel for the United States could not resist it. I do not understand them to deny, that if the overt act be not proved by two witnesses, so as to be submitted to the Jury, that all other testimony must be irrelevant; because no other testimony can prove the act. Now, an assemblage on Blannerhasset's island is proved by the requisite number of witnesses, and the Court might submit it to the Jury, whether that assemblage amounted to a levying of war; but the presence of the accused, at that assemblage, being no where alleged, except in the indictment, the overt act is not proved by a single witness; and of consequence, all other testimony must be irrelevant.

The only difference between this motion as made, and the motion in the form which the counsel for the United States would admit to be regular, is this: It is now general, for the rejection of all testimony. It might be particular, with respect to each witness, as adduced. But can this be wished, or can it be deemed necessary? If enough is proved to shew that the indictment cannot be supported, and that no testimony, unless it be of that description which the attorney for the United States declares himself not to possess, can be revelant; why should a question be taken on each witness?

The opinion of this Court, on the order of testimony, has frequently been adverted to, as deciding this question against the motion.

If a contradiction between the two opinions does exist, the Court cannot perceive it. It was said, that levying war is an act compounded of law and fact, of which the Jury, aided by the Court, must judge. To that declaration the Court still adheres.

It was said, that if the overt act was not proved by two witnesses, no testimony, in its nature corroborative or confirmatory, was admissible, or could be relevant.

From that declaration there is certainly no departure. It has been asked, in allusion to the present case—if a general commanding an army, should detach troops for a distant service,

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would the men composing that detachment be traitors; and would the commander in chief escape punishment?

Let the opinion which has been given answer this question. Appearing at the head of an army would, according to this opinion, be an overt act of levying war: detaching a military corps from it, for military purposes, might also be an overt act of levying war. It is not pretended, that he would not be punishable for these acts; it is only said, that he may be tried and convicted on his own acts, in the State where those acts were committed; not on the acts of others in the State where those others acted.

Much has been said, in the course of the argument, on points, on which the Court feels no inclination to comment particularly: but which may, perhaps not improperly, receive some notice.

That this Court dare not usurp power is most true.

That this Court dare not shrink from its duty is not less true.

No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But, if he has no choice in the case; if there is no alternative presented to him but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace.

That gentlemen, in a case the utmost interesting, in the zeal with which they advocate particular opinions, and under the conviction, in some measure, produced by that zeal, should, on each side, press their arguments too far; should be impatient at any deliberation in the Court, and should suspect or fear the operation of motives to which alone they can ascribe that deliberation, is, perhaps, a frailty incident to human nature: but if any conduct on the part of the Court could warrant a sentiment, that they would deviate to the one side or the other, from the line prescribed by duty and by law, that conduct would be viewed by the Judges themselves with an eye of extreme severity, and would long be recollected with deep and serious regret.

The arguments on both sides have been intently and deliberately considered. Those which could not be noticed, since to notice every argument and authority would swell this opinion to a volume, have not been disregarded. The result of the whole is a conviction as complete, as the mind of the Court is capable of receiving on a complex subject, that the motion must prevail.

No testimony relative to the conduct or declarations of the prisoner elsewhere, and subsequent to the transaction on Blannerhasset's island, can be admitted; because such testimony, being in its nature merely corroborative, and incompetent to prove the overt act in itself, is irrelevant, until there be proof of the overt act by two witnesses.

This opinion does not comprehend the proof, by two witnesses, that the meeting on Blannerhasset's island was procured by the prisoner. On that point, the Court, for the present, withholds its opinion, for reasons which have been already assigned; and as it is understood from the statement made on the part of the prose-

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cution, that no such testimony exists. If there be such, let it be offered, and the Court will decide upon it.

The Jury have now heard the opinion of the Court, on the law of the case. They will apply that law to the facts, and will find a verdict of guilty or not guilty, as their own consciences may direct.

It is true, that although no further testimony be offered, yet, it is in the power of the Jury to find its verdict of *guilty* or *not guilty*. The Court have given its opinion: it has said, that yet, if the Jury can satisfy themselves of the guilt of the prisoner, by the evidence of two witnesses, they have the right to find a verdict of *guilty*. The Court have done its duty: and it is for the Jury to do theirs.

As soon as the Chief Justice had concluded, Mr. *Hay* rose to observe, that the opinion just expressed by the Court, furnished matter for the very serious consideration of the prosecution. As he had not very distinctly heard every part of the opinion, he hoped the Court would allow him an hour or two for its more complete consideration. He requested, also, the use of the opinion, for his more particular inspection. Some desultory conversation ensued, on the possibility and propriety of printing it, for the use of the Court. The arrangement was, however, waved; when Mr. Hay requested the Chief Justice to permit him to have the use of the paper itself. The latter expressed some doubts about Mr. Hay's ability to decypher it, but cheerfully conceded to the request.

Mr. *Hay* moved an adjournment of the Court until Wednesday, twelve o'clock, which Mr. Lee objected to, on account of the number of witnesses who were detained on the trial; and Mr. Randolph on account of the inconveniencies to which it would subject some of the Jurymen. The *Chief Justice* then proposed to adjourn the Court till six o'clock this evening: by which time, perhaps, the counsel for the prosecution might determine on the course which they would pursue. Mr. *Wirt* observed, that it would take, at least, till six o'clock to decypher the opinion.

Chief Justice. We adjourn the Court till six o'clock; and if the prosecution are not ready, we may adjourn till a more distant time.

Mr. *Burr.* I would ask, if necessary, that the Jury should, in the mean time, go more at large. This proposition was finally rejected.

The Court adjourned at six o'clock, without doing any thing.

END OF THE SECOND VOLUME.

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